Supreme Court, U.S.
FILED
06-233 AUG 11 2006
OFFICE OF THE CLERK

No. 06-

IN THE

Supreme Court of the United States

STACY A. GIBSON,

Petitioner,

v.

ADA COUNTY, *et al*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IDAHO

PETITION FOR WRIT OF CERTIORARI

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Attorney for Petitioner

QUESTIONS PRESENTED

I. Whether Petitioner, employed as a deputy sheriff with a public agency (Ada County), has a statutory right of action under the *Fair Labor Standards Act* (FLSA), 29 U.S.C. § 216(b), from the events stemming from the employer's violations of § 211(c) and § 207(k), FLSA, and Petitioner's refusal to resign her employment when threatened with retaliatory criminal prosecution, without probable cause.

II. Whether Ada County was required to provide Petitioner due process in a "pre"-termination *Loudermill*[1] hearing **prior to** termination of that classified employment, when Petitioner's "hearing" occurred **after** termination from employment; whether the decision of an elected official (Sheriff) to terminate Petitioner can stand as the "final" act, contrary to Petitioner's vested rights to engage due process protection under the County Merit System, the Federal Due Process Clause, existing Federal and Idaho law; and, whether Petitioner has a due process right under the 14th Amendment of the U. S. Constitution, and Article I, § 13 of the Idaho Constitution, to engage in an agency review process and judicial proceedings thereafter to address the lack of "good cause" when terminating her classified employment.

III. Whether the former provisions of § 1-7G-1 through § 1-7G-3, Ada County Code, and the provisions contained in the County Commissioners' March 21, 2006 amendments to §1-7G-1 through § 1-7G-3 (Ordinance No. 612), Ada County Code, comply with *Idaho Code*, § 31-714, the due process provisions of the Idaho Constitution and the Due Process Clause of the U.S. Constitution, or be regarded as repugnant to law for denying a classified employee the right to

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[1] *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487 (1985).

participate in procedural due process, in light of the Idaho Supreme decision declaring Ada County Code, § 1-7G-3(O) "infirm" and "conflicts with the general laws of this State".

IV. Whether Ada County committed an intentional concealment and perversion of truth (fraud) by failing to disclose to Idaho courts how Ada County Sheriff had misclassified Jail Technicians as exempt under 29 U.S.C. § 207(k) for many years, beginning 1993-1995 to the date beyond Petitioner's duration of employment, and whether such intentional failure to disclose FLSA violations, was undertaken to avoid County liability and relief to Petitioner.

V. Whether the Idaho Supreme Court suppressed due process when denying Petitions For Writ of Certiorari and Mandamus, and engaged in a process of sidestepping issues presented by Petitioner, entering conclusions of law contrary to existing federal authority, and pursuing what appears a "result oriented" focus to insulate the agency from liability.

VI. Whether the cause of action in Petitioner's Title 42 U.S.C. § 1983 action begins to accrue upon the occurrence of the "last overt act" for purposes of applying the statute of limitations for conduct undertaken by Ada County.

LIST OF ALL PARTIES

STACY A. GIBSON[2],

Petitioner,

v.

ADA COUNTY, a political subdivision of Idaho; ADA COUNTY SHERIFF'S OFFICE; VAUGHN KILLEEN, acting individually and in his official capacity under color of State Law as Ada County Sheriff; R. MONTE MACCONNELL, acting individually and in his official capacity under color of State Law as Legal Advisor to the Ada County Sheriff; ARVILLE GLENN, acting individually and in his official capacity under color of State Law as a law enforcement official for Ada County under the Sheriff; SCOTT JOHNSON, acting individually and in his official capacity under color of State Law as a law enforcement official for Ada County under the Sheriff; and DOES I thru X,

Respondents.

STACY A. GIBSON[3],

Petitioner,

v.

ADA COUNTY, a political subdivision and governmental agency of the State of Idaho, and the ADA COUNTY SHERIFF'S OFFICE,

Respondents.

[2] Idaho Supreme Court Docket No. 29694
[3] Idaho Supreme Court Docket No. 30976

List Of All Parties

ADA COUNTY[4],

Respondent,

v.

STACY A. GIBSON,

Petitioner.

[4] Idaho Supreme Court Docket No. 31553

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF ALL PARTIES	iii
TABLE OF CONTENTS	v
TABLE OF CITED AUTHORITIES	vi
TABLE OF APPENDICES	xiii
OPINION BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED	2
INTRODUCTORY STATEMENT OF CASE	3
STATEMENT OF FACTS	
Docket No. 30976	10
Docket No. 31553	13
Docket No. 29694	15
REASONS FOR GRANTING THE PETITION	
Docket No. 30976	16
Docket No. 31553	22
Docket No. 29694	26
CONCLUSION	30

TABLE OF CITED AUTHORITIES

Page

Cases

Allen v. Lewis-Clark State College,
105 Idaho 447, 670 P.2d 854 (1983)..... 20, 21

Andrews v Montgomery Ward & Co.,
30 F Supp 380 (DC Ill., 1939)..... 23

Barth v. Canyon County,
128 Idaho 707 (1996)..... 12

Berry v. Stevinson Chevrolet,
74 F.3d 980, 984, 986 (CA10 1996)..... 29

Board of Regents vs. Roth,
408 U.S. 564, 569 (1972)..... 27

Brooklyn Bank v. O'Neil, 324 U.S. 697,.
p. 697 and 705 (1945)..... 26

Burlington Northern & Santa Fe Railway Co. v. White, 548 U.S. ___ (2006)..... 29

Caserta v. Home Lines Agency, Inc.,
273 F2d 943 (CA2 NY, 1959)..... 23

Clark v. O'Malley, et al., Case No. 276, Court of Special Appeals of Maryland,
filed June 30, 2006..... 22

Cleveland Board of Education v. Loudermill,
470 U.S. 532, 105 S.Ct. 1487 (1985).....8, 9, 15, 16, 21

Cobell, et al. v. Kempthorne, et al.,
Case No. 05-5269, U.S. Court of Appeals for the District of Columbia..... 30

Table Of Cited Authorities

	Page
Dominici v. Board of Education of the City of Chicago, 881 F Supp. 315, p. 315, 316 and 320 (N.D. Ill. 1995).....	26
Electors of Big Butte Area v. State Board of Ed., 78 Idaho 602, 308 P.2d 225 (1957).....	18
Ferguson v. Board of Trustees of Bonner County School Dist. No. 82, 98 Idaho 359, 564 P.2d 971 (1977).....	20
Foster v. Walus, 81 Idaho 452, 347 P.2d 120 (1959).....	17, 18
Gallagher v. Ada County et al., 4th District Court, Case No. CVOC 0202022D.....	24
Gibson v. Ada County, Idaho et al, ___ Idaho ___, 133 P.3d 1211 (2006).....	1
Gibson v. Ada County Sheriff's Department, 139 Idaho 5, 72 P.3d 845 (2003).....	11, 12
Gibson v. Ada County, 138 Idaho 781, 69 P.3d 1048 (2003).....	26
Goldberg v. Cockrell, 303 F2d 811 (CA5 Miss., 1962.....	23
Graves v. Cogswell, 97 Idaho 716, 552 P.2d 224 (1976).....	17
H & V Engineering v. Bd. of Pro. Engineers, 113 Idaho 646, 747 P.2d 55 (1987)	20
Hansen v. White, 947 F.2d 1378 (9th Cir. 1991).....	16, 21, 22

Table Of Cited Authorities

	Page
Hansen v. White, 114 Idaho 907, 762 P.2d 820 (1988).....	16
Heck v. Humphrey, 512 U.S. 477 (1994).....	27
Hicks v. Jackson County Commission, Civil Action No. CV-03-S-2858-NE, United States District Court, N.D. Alabama, Northeastern Division, June 23, 2005.....	19
Hill vs. State of Tenn., 868 F. Supp. 221 (1994).....	28
Hodgson v General Motors Acceptance Corp., 347 F Supp 9 (DC Fla., 1972), affd (CA 5 Fla) 482 F2d 825.....	23
Hoesterey vs. City of Cathedral City, 945 F.2d 317 (9th Cir. 1991).....	28
Horton v. Bd. Cnty. Com'rs, Flager Cnty, 202 F.3d 1297 (11th Cir. 2000).....	19, 28
Knickerbocker, et al. v. Ada County, Idaho, Case No. CV 04-288-S-BLW, U.S. District Court, District of Idaho.....	6, 21, 24, 25
Lucas v. Whittaker Corp., 470 F.2d 326 (10th Cir. 1972).....	21
McCoy vs. San Francisco, City & County, 14 F.3d 28 (9th Cir. 1994).....	28
McKinney v. Pate, 20 F.3d 1550 (11th Cir. 1994).....	19, 28

Table Of Cited Authorities

	Page
McNulty v. Sandoval County, No. CIV 05-221 BB/ACT, United States District Court, D. New Mexico, August 15, 2005...	16, 18
Mt. Healthy City Board of Ed. v. Doyle, 429 U.S. 274 (1977).....	21
Pappas v. City of Lebanon, 331 F. Supp. 2d 311, August 16, 2004 (M.D. Pa. 2004).....	29
Pounds v. Denison, 115 Idaho 381, 384, 766 P.2d 1262, 1264 p. 383-384 (1988).....	27
Schware v. Board of Bar Examiners, 353 U.S. 232, 77 S.Ct. 752, 1 L.Ed.2d 796 (1957).....	20
State v. Concrete Processors, Inc., 85 Idaho 277, 379 P.2d 89 (1963).....	18
State v. Finch, 79 Idaho 275, 315 P.2d 529 (1957).....	17, 18
Terlecky v. City of Ruidoso Downs, No. CIV 04-1121 BB DJS, United States District Court, D. New Mexico, January 24, 2006..	18
Thompson v. City of Shasta Lake, No. Civ. S-03-2513 LKK/KJM, April 28, 2004 (E.D. Cal. 2004).....	27
Tuma v. Board of Nursing, 100 Idaho 74, 593 P.2d 711 (1979).....	20

Table Of Cited Authorities

	Page
Walling v Sun Pub. Co., 47 F Supp 180 (DC Tenn., 1942).....	23
Wirtz v Mississippi Publishers Corp., 364 F2d 603(CA5 Miss., 1966).....	23
Woodbridge and Perkins v. Ada County, Case No. 95957, Fourth District Court, Ada County.....	24
Wyckoff v. Board of County Commissioners of Ada County, 101 Idaho 12, 15, 607 P.2d 1066, 1069 (1980).....	20
Zamora v. Village of Ruidoso Down, 907 P.2d 182, 184 (N.M. 1995).....	18, 19
Zinermon v. Burch, 494 U.S. 113, 126, 110 S.Ct. 975, 108 L.Ed.2d 100 (1990)).....	19, 28
Constitutions	
U.S. Constitution.....	1, 2
U.S. Constitution, 14th Amendment.....	2
Idaho Constitution, Article I, § 1.....	2
Idaho Constitution, Article I, § 3.....	1, 2
Idaho Constitution, Article 18, § 6.....	2, 21
Statutes	
28 U.S.C. § 1257.....	2
29 U.S.C. § 201 *et seq*.....	3, 13
29 U.S.C. § 207(k).....	4, 5, 6, 14, 15, 22, 24, 25
29 U.S.C. § 211(c).....	6, 14, 15, 22, 23, 25
29 U.S.C. § 215(a)(2).....	23

Page

29 U.S.C. § 215(a)(3)..... 14, 22, 23
29 U.S.C. § 215(a)(5)..... 23
29 U.S.C. § 216(b)..... 13, 14, 22, 25
42 U.S.C. § 1983..... 12, 15, 19, 26, 27, 28

Idaho Code, § 9-337, *et seq*..... 26
Idaho Code, § 31-714..... 2, 3, 17
Idaho Code, § 31-1506(1)..... 11
Idaho Code, § 31-2603(a)..... 9
Idaho Code, § 67-2345..... 3, 12
Idaho Code, § 67-2345(1)(b)..... 12
Idaho Code, § 67-5275..... 13
Idaho Code, § 67-5276..... 13
Idaho Code, § 67-5277..... 13
Idaho Administrative Procedures Act..... 11, 21

Ada County Code, § 1-7-1 – § 1-7L-10..... 3, 13, 28
Ada County Code, § 1-14-1 – § 1-14-8..... 3,12
Ada County Code, § 1-7C-1 *et seq*..... 3
Ada County Code, § 1-7C-1..... 14
Ada County Code, § 1-7C-6B..... 10
Ada County Code, § 1-7E-2A..... 4
Ada County Code, § 1-7G-3..... 21
Ada County Code, § 1-7G-3A..... 20
Ada County Code, § 1-7G-3A(5)..... 8
Ada County Code, § 1-7G-3A(20)..... 8
Ada County Code, § 1-7G-3B(5)..... 9
Ada County Code, § 1-7G-3C..... 8
Ada County Code, § 1-7G-3D..... 8, 9
Ada County Code, § 1-7G-3L..... 9
Ada County Code, § 1-7G-3O..... 10, 11
Ada County Code, Ordinance No. 110..... 12
Ada County Code, Ordinance No. 612..... 3, 21

Page

Rules

U.S. Supreme Court Rule 10(b)..... 1
U.S. Supreme Court Rule 10(c)..... 2

Idaho Rule of Civil Procedure 84..... 11
Idaho Rule of Civil Procedure 84(a)..... 3
Idaho Rule of Civil Procedure 84(n)..... 13

Other Authorities

Public Law 96-170, December 29, 1979..... 12
Public Law 99-150, Sec. 8, Nov. 13, 1985,
99 Stat. 791..... 22

Title 29, §§ 516.1 and 516.2,
U.S. Code Of Federal Regulations..... 23

Fact Sheet No. 021, U.S. Department of Labor,
Wage and Hour Division..... 23

Ada County Sheriff's Policy Manual,
Chapter 4.00..... 3
Ada County Sheriff's Policy Manual, § 9.04..... 8, 20

April 2006 Annual County Benefit Survey,
Idaho Association of Counties (IAC)..... 30

TABLE OF APPENDICES – VOLUME I

Page

APPENDIX 1 – Opinion Of The Idaho Supreme Court, Filed February 9, 2006..... 1a

APPENDIX 2 – Order Of The Idaho Supreme Court Denying Petition For Rehearing, Filed May 9, 2006..... 32a

APPENDIX 3 – Order Of The Idaho Supreme Court Denying Petition For Writ Of Certiorari, Filed April 25, 2006..... 34a

APPENDIX 4 – Memorandum In Support Of Verified Petition For Writ Of Certiorari, Filed March 22, 2006..... 36a

APPENDIX 5 – Verified Petition For Writ Of Certiorari, Filed March 22, 2006..... 49a

APPENDIX 6 – Remittitur From The Idaho Supreme Court To The Fourth Judicial District, County Of Ada, Filed May 9, 2006..... 60a

APPENDIX 7 – Order Of The Idaho Supreme Court Awarding Costs And Attorney Fees, Filed May 12, 2006..... 63a

APPENDIX 8 – Order For Judgment Entered By Judge Ronald J. Wilper, Fourth District Court (Docket No. 31553), Filed May 25, 2006..... 65a

APPENDIX 9 – Judgment For Costs Entered By Judge Ronald J. Wilper, Fourth District Court (Docket No. 29694), Filed May 25, 2006..... 66a

Table Of Appendices – Volume I

Page

APPENDIX 10 – Judgment For Fees And Costs Entered By Judge Ronald J. Wilper, Fourth District Court (Docket No. 31553), Filed May 19, 2006..... 67a

APPENDIX 11 – Order For Judgment Entered By Judge Ronald J. Wilper, Fourth District Court (Docket No. 29694) Filed May 19, 2006..... 68a

APPENDIX 12 – Order For Judgment Entered By Judge Joel Horton, Fourth District Court (Docket No. 30976), Filed May 19, 2006..... 69a

APPENDIX 13 – Judgment For Fees And Costs Entered By Judge Joel Horton, Fourth District Court (Docket No. 30976), Filed May 19, 2006..... 70a

APPENDIX 14 – Medical Records of F. LaMarr Heyrend, M.D. Dated June 23, 2005, Verifying Gibson Suffers Psychological Workplace Injury (PTSD Diagnosis) Caused By Ada County's Conduct..... 71a

APPENDIX 15 – Judgment On Motion For Summary Judgment And Motion To Strike Entered By Judge Ronald J. Wilper, Fourth District Court (Docket No. 31553), Filed December 16, 2004..... 86a

APPENDIX 16 –Decision And Order Granting [Ada County] Motion For Summary Judgment Entered By Judge Ronald J. Wilper, Fourth District Court (Docket No. 31553), Filed December 10, 2004..... 88a

Table Of Appendices – Volume I

Page

APPENDIX 17 – Memorandum In Support Of [Gibson] Motion For Permission To Appeal From District Court's Interlocutory Order Entered September 16, 2004 By Judge Ronald J. Wilper, Fourth District Court (Docket No. 31553), Lodged December 9, 2004..... 92a

APPENDIX 18 – [Gibson] Motion For Permission To Appeal From District Court's Interlocutory Order Entered September 16, 2004 By Judge Judge Ronald J. Wilper, Fourth District Court (Docket No. 31553), Filed December 9, 2004..... 127a

APPENDIX 19 – Order Denying [Gibson] Motion To Dismiss And Granting [Ada County] Motion To Dismiss Entered By Judge Ronald J. Wilper, Fourth District Court (Docket No. 31553), Filed September 16, 2004..... 132a

APPENDIX 20 – Order On Renewed Motion For Reconsideration And Final Order Denying Petition For Judicial Review Entered By Judge Joel Horton, Fourth District Court (Docket No. 30976), Filed June 17, 2004..... 139a

APPENDIX 21 – Order Of The Idaho Supreme Court, Erroneously Ruling The February 27, 2004 Interlocutory Order Was "Final" Order, And Dismissing Permissive Appeal As Untimely, Filed May 26, 2004..... 143a

APPENDIX 22 – Notice of Reassignment, Filed April 22, 2004..... 145a

Table Of Appendices – Volume I

Page

APPENDIX 23 – Order Denying Petition For Judicial Review And Motion To Remand Case Entered By Judge D. Duff McKee, Fourth District Court (Docket No. 30976), Filed February 27, 2004..... 146a

APPENDIX 24 – Memorandum [Historical Analysis of Ada County Merit System] In Support Of Motion To Reconsider Interlocutory Order Conditionally Denying And Dismissing Petition For Judicial Review, With Leave to Amend, Lodged January 30, 2004..... 149a

APPENDIX 25 – Supplemental Order Entered By Judge Ronald J. Wilper, Fourth District Court (Docket No. 31553), Filed January 5, 2004..... 154a

APPENDIX 26 – Order Of The Idaho Supreme Court Denying Petition For Writ(s) Of Mandamus (Docket No. 30976), Filed October 17, 2003..... 156a

APPENDIX 27 – Memorandum In Support Of Petition For Writ(s) Of Mandamus, Filed September 5, 2003..... 158a

APPENDIX 28 – Verified Petition For Writ(s) Of Mandamus, Filed September 5, 2003..... 174a

APPENDIX 29 – Order Governing Judicial Review Entered By Judge D. Duff McKee, Fourth District Court (Docket No. 30976), Filed August 20, 2003..... 186a

Table Of Appendices – Volume 1

Page

APPENDIX 30 – Order Withdrawing Order Denying Motion For Reconsideration And Order Entered By Judge Ronald J. Wilper, Fourth District Court (Docket No. 31553), Filed June 11, 2003..... 188a

APPENDIX 31 – Memorandum In Support Of [Gibson] Motion For Permission To Appeal From District Court's Interlocutory Order Entered February 19, 2003 By Judge Ronald J. Wilper, Fourth District Court (Docket No. 31553), Lodged May 16, 2003..... 190a

APPENDIX 32 – [Gibson] Motion For Permission To Appeal From District Court's Interlocutory Order Entered February 19, 2003 By Judge Ronald J. Wilper, Fourth District Court (Docket No. 31553), Filed May 2, 2003 ..... 201a

APPENDIX 33 – Order Overruling Objection To Proposed Judgment Entered By Judge Ronald J. Wilper, Fourth District Court (Docket No. 29694), Filed March 5, 2003..... 207a

APPENDIX 34 – [Gibson] Objection to Proposed Order And Judgment, Filed February 19, 2003..... 208a

APPENDIX 35 – Order And Judgment Entered By Judge Ronald J. Wilper, Fourth District Court (Docket No. 29694), Filed February 19, 2003..... 212a

APPENDIX 36 – Order Entered By Judge Ronald J. Wilper, Fourth District Court (Docket No. 31553), Filed February 19, 2003 ..... 214a

Table Of Appendices – Volume I

Page

APPENDIX 37 – Letter From Ada County Board Of Commissioners Dated July 2, 2003, Denying Petitioner The Right To A Due Process Hearing To Address The Wrongful Termination Of Her Classified Employment 216a

APPENDIX 38 – Opinion Of The Idaho Supreme Court, Filed May 28, 2003..... 218a

APPENDIX 39 – Affidavit Of Former Ada County Commissioner, Sharon M. Ullman, Dated January 30, 2003, Verifying Ada County's Ongoing FLSA Noncompliance And Need To Address The Matter..... 228a

APPENDIX 40 – Memorandum Regarding New Payroll System From Ada County Sheriff, Vaughn Killeen, To All Sheriff's Office Personnel, Dated January 9, 2002..... 232a

APPENDIX 41 –Letter From The Ada County Prosecutor's Office To The Board Of Ada County Commissioners Dated February 12, 2001, Regarding Need For County Compliance With FLSA..... 234a

APPENDIX 42 – Letter To Petitioner From Director Of Idaho Department Of Labor, Roger B. Madsen, Dated February 23, 2000, Stating The Department Has No Authority To Investigate Wage Claims Against Public Agencies [Ada County], And Gibson Should Seek Recovery Under Provisions Of The Fair Labor Standards Act, 29 U.S.C. § 201 *et seq*..... 241a

Table Of Appendices – Volume I

Page

APPENDIX 43 – Letter From Petitioner's Counsel To Ada County Sheriff Dated February 18, 2000, Demanding Ada County Pay Petitioner All Wages To Which She Is Entitled, Including Earnings Owed From County's Breach Of The Employment Contract..... 243a

APPENDIX 44 – Letter From Stephen E. Spencer, M.D. To Idaho State Board Of Medicine, Dated February 3, 2000, Advising The Sheriff's Legal Advisor, R. Monte MacConnell, Was Intentionally Distorting Information Concerning Gibson..... 244a

APPENDIX 45 – Letter From Ada County Prosecutor's Office To Petitioner's Counsel Dated January 7, 2000, Addressing Appeal Provisions Of Ada County Merit System, Claiming Petitioner Was Obligated To Sign Payroll Vouchers Within Five Days, And Denying Petitioner Wages After August 24, 1999..... 246a

APPENDIX 46 – Letter From Ada County Sheriff, Vaughn Killeen, Dated December 27, 1999, Misrepresenting Facts And Due Process Provisions Of Ada County Code (Merit System), And Terminating Petitioner's Classified Employment Without Providing Petitioner A *Loudermill* Due Process Hearing..... 249a

APPENDIX 47 – Medical Records From Stephen E. Spencer, M.D. Dated November 12, 1999,

Table Of Appendices – Volume I

Page

Verifying Gibson Was Medically Incapable Of Defending Herself Against Allegations Made By The Sheriff..... 252a

APPENDIX 48 – Letter From Sheriff's Legal Advisor, R. Monte MacConnell, Dated August 25, 1999, Placing Gibson On Administrative Leave Without Pay, In Violation Of Ada County Code, § 1-7G-3B (5), And Terminating Petitioner's Medical Benefits..... 254a

APPENDIX 49 – Letter From Gibson's Counsel To The Sheriff's Legal Advisor, Dated August 24, 1999, Addressing What Conditions Gibson Would Consent To Administrative Leave Without Pay..... 256a

APPENDIX 50 – Medical Records From Stephen E. Spencer, M.D. Dated August 20, 1999, Verifying Gibson's Medical Condition Left Her Unable To Represent Herself..... 258a

APPENDIX 51 –Letter From The Canyon County Chief Deputy Prosecutor To The Ada County Prosecutor Dated August 20, 1999, Notifying Criminal Charges Against Gibson Were Inappropriate..... 259a

APPENDIX 52 – Letter From Sheriff's Legal Advisor, R. Monte MacConnell, Dated August 11, 1999, Acknowledging Gibson's Right And Demand For A Due Process Pre-Termination Hearing, Acknowledging Awareness Of Gibson's

Table Of Appendices – Volume I

Page

Medical Condition, Acknowledging Salary Paid To Gibson Was In Error, And Advising Gibson Would Receive Salary Owed To Her, Up To the Actual Date Of Termination..... 260a

APPENDIX 53 –Letter From The Ada County Prosecutor Dated August 9, 1999, Granting Authority To The Canyon County Chief Criminal Deputy Prosecutor To File Charges Against Gibson, With The Intent To Have The Canyon County Chief Deputy Prosecutor "Appointed" As Special Prosecutor, In A Fashion Contrary To Idaho Law..... 262a

APPENDIX 54 – Medical Records From Stephen E. Spencer, M.D., Verifying Gibson's Medical Condition Had Not Improved, And She Was Incapable Of Participating In Any Hearing Until Further Notice..... 264a

APPENDIX 55 – Notice Of Intent To Impose Discipline [Termination] On Gibson From Ada County Sheriff Dated August 2, 1999, Containing Misstated Facts, False Charges, Contrary To Any Good Cause To Terminate Employment, And Acknowledging Gibson's Right to a Due Process Pre-Termination Hearing..... 265a

APPENDIX 56 –Communication From Ada County Payroll Department Dated July 19, 1999, To The Budget Director Of the Ada County Sheriff's Office..... 268a

Page

APPENDIX 57 – Memorandum From Sheriff's Legal Advisor, R. Monte MacConnell, Dated December 23, 1997, Confirming Non-Commissioned Deputies Could Not Be Compensated Under FLSA § 207 k, As Those Deputies Were Not "Law Enforcement Personnel", And Employees Could Not Waive Their Protections Under FLSA..... 275a

TABLE OF APPENDICES – VOLUME II

COUNTY ORDINANCES

APPENDIX A – Ada County Personnel System (Merit System), § 1-7-1 Through § 1-7L-10, Ada County Code (Chapter 7)..... 277a

APPENDIX B – Ada County Hearing Procedures, § 1-14-1 Through § 1-14-8, Ada County Code (Chapter 14)..... 394a

APPENDIX C – Ada County Ordinance No. 612 .... 399a

IDAHO CONSTITUTION

APPENDIX D – Article 18, § 6..... 412a

IDAHO STATUTES

APPENDIX E – Title 31 (Counties And County Law), Chapter 7 (Board Of County Commissioners), § 31-714 (Ordinances – penalties) 413a

Table Of Contents – Volume II & III

Page

APPENDIX F – Title 67 (State Government And State Affairs), Chapter 23 (Miscellaneous Provisions), § 67-2345 (Executive Sessions – When Authorized)..... 414a

APPENDIX G – Title 31 (Counties And County Law), Chapter 26 (Prosecuting Attorney), § 31-2603 (Special prosecutor – Appointment)..... 416a

IDAHO RULES OF CIVIL PROCEDURE

APPENDIX H – (I.R.C.P.), Rule 84 (a)..... 418a

TABLE OF APPENDICES – VOLUME III

APPENDIX 58 – Memorandum Decision and Order (Document No. 65), Entered June 12, 2006 By Chief Judge, B. Lynn Winmill, In The Matter Of *Knickerbocker, et al. v. Ada County, Idaho*, Case No. CV 04-288-S-BLW, U.S. District Court, District Of Idaho..... 420a

APPENDIX 59 – Affidavit Of Plaintiff's Counsel, Daniel E. Williams (Document No. 21-1), Filed February 11, 2005 In *Knickerbocker, et al. v. Ada County, Idaho*, Case No. CV 04-288-S-BLW, U.S. District Court, District Of Idaho, Attesting To The Validity Of Documents Attached Thereto..... 424a

APPENDIX 60 – Excerpt Taken From Ada County's Response To Interrogatory No. 3 (Document No. 21-5, p. 2), Verified By Gary Raney, Newly Elected Ada County Sheriff, Filed February 11,

Table Of Appendices – Volume III

Page

2005 In *Knickerbocker, et al. v. Ada County, Idaho*, CV 04-288-S-BLW..... 427a

APPENDIX 61 – Excerpt Taken From Ada County's Response To Interrogatory No. 9 (Document No. 21-5, p. 4-5), Verified By Gary Raney, Newly Elected Ada County Sheriff, Filed February 11, 2005 In *Knickerbocker, et al. v. Ada County, Idaho*, CV 04-288-S-BLW..... 428a

APPENDIX 62 – Excerpt Taken From Ada County's Response To Interrogatory No. 10 (Document No. 21-5, p. 5), Verified By Gary Raney, Newly Elected Ada County Sheriff, Filed February 11, 2005 In *Knickerbocker, et al. v. Ada County, Idaho*, CV 04-288-S-BLW..... 430a

APPENDIX 63 – Excerpt Taken From Ada County's Response To Interrogatory No. 12 (Document No. 21-5, p. 6), Verified By Gary Raney, Newly Elected Ada County Sheriff, Filed February 11, 2005 In *Knickerbocker, et al. v. Ada County, Idaho*, CV 04-288-S-BLW..... 431a

APPENDIX 64 – Excerpt Taken From Ada County's Response To Interrogatory No. 13 (Document No. 21-5, p. 6-7), Verified By Gary Raney, Newly Elected Ada County Sheriff, Filed February 11, 2005 In *Knickerbocker, et al. v. Ada County, Idaho*, CV 04-288-S-BLW..... 432a

APPENDIX 65 – Ada County's Supplemental Affidavit Of Kelli Bolicek, Filed In Support Of

Table Of Appendices – Volume III

Motion For Summary Judgment, December 2, 2004, In The Matter Of *Ada County v. Stacy A. Gibson*, CV OC 0107394D..... 433a

APPENDIX 66 – Ada County's Affidavit Of Cheryl Bower, Filed In Support Of Motion For Summary Judgment, December 2, 2004, In The Matter Of *Ada County v. Stacy A. Gibson*, CV OC 0107394D..... 438a

APPENDIX 67 – [Gibson] Memorandum Submitted In Opposition To Ada County's Motion For Summary Judgment, November 1, 2004, In The Matter Of *Ada County v. Stacy A. Gibson*, CV OC 0107394D..... 442a

APPENDIX 68 – Ada County's Affidavit Of Kelli Bolicek, Filed In Support Of Motion For Summary Judgment, September 29, 2004, In The Matter Of *Ada County v. Stacy A. Gibson*, CV OC 0107394D..... 455a

APPENDIX 69 – Letter From Ada County Under-Sheriff, Gary Raney (Later Elected Sheriff), To Dawn K. McKinney, Dated June 1, 2004, Advising Reasons She Was Sent Compensation Due To County's Misuse of "7K" Exemption..... 459a

APPENDIX 70 – The FLSA "Release" Or "Waiver" Enclosed With Letter (Appendix 69) Undersheriff, Gary Raney, Sent To Dawn K. McKinney, Dated June 1, 2004..... 462a

APPENDIX 71 – Letter From Gibson's Counsel To

Table Of Appendices – Volume III

Page

Then Ada County Sheriff, Vaughn Killeen, Dated June 1, 2004 (Stemming From Discovery Of Appendix 69), Requesting The County Disburse Funds To Gibson Because Of The Misuse Of The "7K" Exemption Which Caused Under Compensation To Her As A Jail Technician..... 463a

APPENDIX 72 – Letter From Gibson's Counsel To Ada County Attorney, Ray J. Chacko, Dated June 18, 2004, Advising Awareness Ada County Under Compensated Jail Technicians Because Of The Violation Of The "7K" Exemption, Knowledge Of The County's Recent Efforts To Disburse Funds To Jail Technicians For Under Compensated Overtime, And Demand Ada County Disburse Funds To Gibson In A Non-Discriminatory Manner, Pursuant To FLSA..... 465a

APPENDIX 73 – [Gibson] Verified Second Amended Counterclaim, Filed February 2, 2004, In The Matter of *Ada County v. Stacy A. Gibson*, CV OC 0107394D..... 474a

APPENDIX 74 – Excerpt Of Kelli Bolicek's Testimony Taken During Gibson's Personnel Hearing On January 26, 2000..... 534a

APPENDIX 75 – Excerpt of Marshia Eiguren's Testimony Taken During Gibson's Personnel Hearing On January 26, 2000..... 542a

APPENDIX 76 – Ada County Sheriff's Office Policy Manual, § 7.05 (2) (Members' Rights),

Table Of Appendices – Volume III

Page

Effective October 1, 1998, Approved By
Ada County Sheriff, Vaughn Killeen..... 548a

APPENDIX 77 – Ada County Sheriff's Office
Policy Manual, § 7.05 (4) (Members' Rights),
Effective October 1, 1998, Approved By
Ada County Sheriff, Vaughn Killeen..... 549a

APPENDIX 78 – Ada County Sheriff's Office
Policy Manual, § 7.05 (7) (Members' Rights),
Effective October 1, 1998, Approved By
Ada County Sheriff, Vaughn Killeen..... 550a

APPENDIX 79 – Ada County Automatic
Paycheck Deposit Authorization, Dated
August 6, 1998 And Signed By Gibson..... 551a

OPINION BELOW

The Idaho Supreme Court Opinion is reported in *Gibson v. Ada County, Idaho et al*, ___ Idaho ___, 133 P.3d 1211 (2006)(*Appendix 1*). Orders were entered Denying Petition For Rehearing (*Appendix 2*), Petitions For Writ of Certiorari (*Appendix 3*) and Mandamus (*Appendix 26, 27 & 28*).

JURISDICTION

The subject Opinion was filed February 9, 2006 (*Appendix 1*). In the absence of statutory authorization for judicial review of Petitioner's termination, Ms. Gibson filed a Petition For Writ Of Certiorari (*Appendix 4 & 5*), requesting the Idaho Supreme Court review the actions of Ada County, a political subdivision, acting through its Commissioners, Sheriff, Legal Advisor, and Personnel Hearing Officer, to determine whether their termination was in excess of the agency's jurisdiction, and pursued in absence of constitutional authority. That Petition was denied (*Appendix 3*). Petition For Rehearing of the February 9th Opinion was denied May 9, 2006 (*Appendix 2*); Remittitur issued (*Appendix 6*), and Awarded Costs and Fees May 12, 2006 (*Appendix 7*).

The lower courts then entered Orders awarding Attorney Fees and Costs (*Appendix 8, 9, 10, 11, 12 & 13*).

Pursuant to Article I, § 3, Idaho State Constitution, Idaho is an inseparable part of the Union, and the U.S. Constitution is the supreme law of the land, granting this Court jurisdiction over Constitutional rights. This Court has jurisdiction pursuant to U.S. Supreme Court Rule 10 (b), as Idaho's Supreme Court denied Petitioner protection afforded by the Statutes of the United States, deciding federal questions that conflict with prior rulings, and contrary to U.S. Courts Of Appeals, and denied Petitioner rights guaranteed under the U.S. Constitution. This Court has jurisdiction

under U.S. Supreme Court Rule 10 (c), as the Idaho Court incorrectly decided questions of federal law that have not been, but should be, settled by this Court. This Court has jurisdiction pursuant to 28 U.S.C. § 1257, to review Ada County Ordinance (authorized by § 31-714, *Idaho Code*) now declared "infirm" by the Idaho Supreme Court. The County's Ordinance is repugnant to the U.S. Constitution, as it effectively denies a due process procedural format to exercise a right of protection.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

1. U.S. Constitution, 14th Amendment:

   § 1 ...No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. Idaho Constitution, Article I, § 1:

   § 1 Inalienable rights of man. – All men are by nature free and equal, and have certain inalienable rights, among which are enjoying and defending life and liberty; acquiring, possessing and protecting property; pursuing happiness and securing safety.

3. Idaho Constitution, Article I, § 3:

   § 3 State inseparable part of union. – The state of Idaho is an inseparable part of the American Union, and the Constitution of the United States is the supreme law of the land.

4. Idaho Constitution, Article 18, § 6:

   § 6 County officers. – .....The sheriff, ... shall be empowered by the county commissioners to appoint such deputies and clerical assistants as the business of their

office may require.....". (*See Appendix D* for complete text).

5. *Fair Labor Standards Act*, 29 U.S.C. § 201 *et seq.*
6. *Idaho Code*, § 31-714:

   § 31-714. Ordinances — penalties. – The board of county commissioners may pass all ordinances and rules and make all regulations, not repugnant to law....". (*See Appendix E* for complete text).
7. *Idaho Code*, § 67-2345 (*Appendix F*).
8. *Ada County Code*, § 1-7-1 – § 1-7L-10 (*Appendix A*).
9. *Ada County Code*, § 1-14-1 – § 1-14-8 (*Appendix B*).
10. *Ada County Code*, Ordinance No. 612 (*Appendix C*).
11. *Idaho Rule of Civil Procedure* 84(a) (*Appendix H*).

INTRODUCTORY STATEMENT OF THE CASE

The dispute between Petitioner and Ada County, Idaho, began when Ada County Sheriff, Vaughn Killeen, caused Petitioner, a permanent status Jail Technician employee, to suffer extensive interrogation on July 20, 1999, with subsequent termination of her classified employment without proper cause, and ongoing retaliation and discrimination, giving rise to a series of litigation proceedings. Three cases before the Idaho Supreme Court were consolidated for disposition (Docket Nos. 29694, 30976 and 31553), from which this Petition is sought.

The background of historical events of Petitioner's employment began in 1997, when Petitioner sought a career with law enforcement, and became employed with the Sheriff July 10, 1997. All compensation from said agency is controlled by Chapter 4.00, Sheriff's Policy Manual, Ada County Code (hereafter referred to as A.C.C.), § 1-7C-1 *et seq.* (*Appendix A*, p. 316a-326a), and regulated by the *Fair Labor Standards* Act (FLSA), Title 29 U.S.C., § 201 *et seq.*

In December, 1997, Ms. Gibson received a copy of a memorandum (*Appendix 57*) regarding overtime accrual and the 48 hour workweek rather than a 40 hour workweek from her supervisor. The Sheriff had long been reducing overtime compensation since *circa* 1993. The Legal Advisor had finally acknowledged staff members were not "law enforcement personnel", and did not qualify as exempt under § 207(k), FLSA for overtime calculations. Despite that acknowledgement, the Sheriff's practice of wrongfully using this "7k exemption" continued, and perpetuated throughout the entire duration of Ms. Gibson's employment, suffering errors for overtime wage miscalculations from the practice he started back in 1993-1995 era.

Pursuant to County Personnel System (Merit System), § 1-7E-2A, A.C.C. (*Appendix A*, p. 335a), Ms. Gibson received permanent classified employment status July 1, 1998, vesting rights under the Personnel System, and Due Process Clause.

Ms. Gibson always observed pay errors in the monthly pay vouchers required to be signed before Payroll would disburse earned wages. Ms. Gibson initially contacted Payroll and informed them. Payroll said error(s) would be corrected by them, but if you refuse to sign any voucher on account of error(s), no wage could be disbursed, as the system **required** a signed voucher to authorize pay, for the pay period, regardless of errors. Ms. Gibson learned to accept the errors, and believed Payroll would pay the wage owed her. A full text of the pay voucher used at the relevant time is in *Appendix 1*, p. 3a & *Appendix 38*, p. 219a.

Ms. Gibson was promoted and transferred to the main facility October 16, 1998, where she pursued her career, received overtime assignments, and completed 204 hours of course study by June 17, 1999.

Before her transfer, her gross monthly wage was $1,500.00, directly deposited by Payroll into a joint checking account with her husband. She never saw nor ever endorsed wage checks, as

it was processed under the County's automatic Direct Deposit Program.

By November, 1998, Payroll was committing more errors than just the "7k" error in wage accounting (*Appendix 56*). Firstly, instead of entering Ms. Gibson's new wage of $1,575.00 per month from the promotion, Payroll unexplainably entered $1,550.00 per month. Secondly, the erroneous § 207(k) classification was continuing and thirdly, Payroll programmed the computer system to pay Ms. Gibson one-half wage for her first position (Records Technician) for October 1-15, 1998, and one-half the new wage (though short) for the promoted position (Jail Technician) for October 16-31, 1998. Payroll put that "mixed" wage information into a "tickler file" apparently intending to calculate her wage differently after October, but Payroll failed to remove the reference, and made matters worse by disbursing full payment on both positions. *See Appendix 74*, p. 538a-539a, *Appendix 75*, p. 544a.

One figure, $3,050.00, was appearing on vouchers, but the voucher was a Payroll authorization, not a Payroll accounting statement. This miscalculation continued for eight (8) months (November, 1998 through June, 1999), and went undetected by Payroll (*Appendix 74 & 75*), and unknown to Petitioner or her husband. Payroll's negligent conduct caused the claimed overpayment deposit of $8,528.89.

Payroll claimed that amount (*Appendix 65, 66 & 68*). Ms. Gibson reconciled the accounting based on what she calculated they owed (*Appendix 73*). *See also Appendix 76.*

Ms. Gibson had ceased questioning the voucher entries because of what Payroll told her. She never saw or endorsed a check; had no personal involvement with any account register; never opened bank statements nor tried to balance the account. Her husband's work, selling farm equipment, resulted in deposits and withdrawals to the account, and he left the accounting such that it might be addressed if an overdraft

occurred. He withdrew funds regularly through ATM machines to transact cash expenditures while on sales' campaigns, and made deposits of his earned commissions into the account that ranged widely each month.

The County's failure to keep and maintain accurate wage and benefit records under FLSA caused the errors, including misuse of § 207(k), clear back to 1993[5]. *See* discovery responses in *Knickerbocker, et al. v. Ada County, Idaho*, Case No. CV 04-288-S-BLW, U.S. District Court, District of Idaho, *Appendix 59, 60, 61, 62, 63 & 64.*

The County's non-conforming record-keeping system caused FLSA violations (§ 211(c)), with underpayment – overpayment of regular wage, with retention of accrued overtime wages (§ 207(k) exemption), causing inaccurate deposits to be processed under the Direct Deposit Program.

Initial discovery began July 19, 1999, as Payroll determined overtime wages were due a group of employees, but not the § 207(k) violation. Payroll relayed a facsimile transmission (*Appendix 56*) to the Sheriff's Budget Director, identifying nine (9) employees thought "shorted" overtime wage, from October 1998 through June 1999 in a grant fund category. Ms. Gibson was listed among those employees (*Appendix 56, p. 270a*). When the Director reviewed the list, she still believed Ms. Gibson was **underpaid**, but that list was intended to address grant funds, and Ms. Gibson was not receiving grant funds. The Director was "working on a **problem** with a grant" (Emphasis added). (*Appendix 74*, p. 535a).

With the July 19th discovery, further issues of payments were discovered in Payroll, and that unleashed the

---

[5] Further discussion concerning Ada County's recognized misclassification of Jail Technicians being "exempt under 29 U.S.C. § 207(k)" was revealed to be sometime between "1993 to 1995", and the County's concealment of this information can be found on pages 24 & 25 of this Petition.

confrontation that began the afternoon of July 20, 1999. Ms. Gibson was on medical leave, at home, when a Sheriff detective called and requested she come to the Office. Ms. Gibson came, thinking she was selected for another work assignment in light of her special course study. These detectives, for two and one-half (2 ½) hours, gruesomely interrogated Ms. Gibson over the wage errors, and contrary to Sheriff's policy (*Appendix 77 & 78*), threatened her, using intrusive criminal techniques, calling her a thief, a liar, claimed she collaborated to cause overpayments deposited into the account; threatened her with criminal prosecution for grand theft, with incarceration, loss of her job, and the destruction of her career. Ms. Gibson was crushed and devastated by the false accusations, as these trained interrogationists pummeled their threats one after another. She had done none of what they were accusing her, and perceived herself "framed" over the County's errors.

These detectives **knew** Ms. Gibson had no involvement, as it was a direct deposit program; Ms. Gibson told them payroll vouchers had always been wrong; Payroll said they would correct pay errors, and it was not her responsibility. Ms. Gibson said the County could take her accrued comp, overtime, holiday and vacation time to offset confirmed overpayments. The County could also debit under the Direct Deposit Program (*Appendix 79*). She complained about the entire proceeding, their threats, the accounting errors, FLSA record-keeping violations, and asked for reconciliation, if pay reduction was necessary.

When Ms. Gibson arrived home, she was so overwhelmed, her husband contacted Dr. Stephen E. Spencer, M.D., who agreed to see her July 23, 1999. She was diagnosed with acute depression (*Appendix 50 & 54*). Ms. Gibson believed she must secure an attorney to protect her career.

By July 28, 1999, Ms. Gibson had counsel, who received a call from the Sheriff's Legal Advisor, stating the Sheriff wanted Ms. Gibson terminated immediately, and if she would not resign, the County would process felony charges against her for grand theft, and then fire her as well.

Ms. Gibson's attitude over her innocence was resolute; she would not accept blame for the County's flawed wage and benefit record-keeping violations; she would not resign her career, and not allow her job be stolen and wanted these issues in a due process hearing. With no possibility of resignation, Sheriff Killeen served Ms. Gibson his Notice of Intent to Impose Discipline (*Appendix 55*), stating it was his intent to terminate her employment because he believed she violated § 1-7G-3A(5), A.C.C. (*Appendix A*, p. 347a) and § 1-7G-3A(20) (*Appendix A*, p. 349a) and § 9.04 of the Sheriff's Policy Manual.

Sheriff Killeen had a determined attitude to terminate her, as he claimed Ms. Gibson was responsible for the payroll errors because she signed the vouchers, regardless of the County's FLSA violations.

As provided in § 1-7G-3C, County Personnel System (*Appendix A*, p. 351a), Ms. Gibson appealed the Sheriff's intent to terminate; denied any violation of the Personnel System, the Sheriff's Policy Manual or the Statutes of Idaho; that no basis existed to terminate, nor probable cause to prosecute, and requested a "hearing", authorized under § 1-7G-3D, County Personnel System (*Appendix A*, p. 352a).

Dr. Spencer notified the Sheriff Ms. Gibson's state had not improved to participate in confrontational hearings (*Appendix 47, 50 & 54*).

The Legal Advisor acknowledged Ms. Gibson's right to a *Loudermill* due process hearing, acknowledged awareness of Ms. Gibson's medical condition, acknowledged Ms. Gibson was overpaid **in error**, and advised Ms. Gibson **would receive wages owed to her** (*See Appendix 52*).

After Ms. Gibson served her request for a *Loudermill* hearing, the Sheriff's attitude intensified, and continued retaliation with threat of prosecution.

The Sheriff had Greg H. Bower, Ada County Prosecutor, send a letter to John Christensen, Chief Criminal Prosecutor, Canyon County, Idaho, stating he had **authorization** "to file charges..." *(Appendix 53)*. Such conduct was not authorized by *Idaho Code* §31-2603(a) (*Appendix G*); that letter carried forward the Sheriff's threat to frighten Ms. Gibson to resign. This conduct was malicious and retaliatory, pursued to get Ms. Gibson to relinquish a property right. Mr. Christensen announced criminal charges were "**inappropriate**" (*Appendix 51*).

Because of this continuing threat, Dr. Spencer diagnosed acute depression and situational distress (*Appendix 47 &50*).

On August 24, 1999, this Legal Advisor placed Ms. Gibson on administrative leave, **without** pay, canceled medical benefits (*Appendix 48*), and ignored efforts of Ms. Gibson, who would agree to temporary leave if insurance benefits continued (*Appendix 49*). This leave was taken in contradiction of § 1-7G-3B(5), A.C.C. (*Appendix A*, p. 350a-351a), a provision uniquely specific to paid leave.

On October 5, 1999, the Sheriff "**ordered**" Ms. Gibson diagnosed by the County Physician, Dr. Charles Steuart. Ms. Gibson and her husband did go as "**ordered**", and diagnosed by Dr. Steuart, who confirmed trauma diagnosed by Dr. Spencer.

Her medical condition was communicated to the Sheriff (*Appendix 47, 50 &54*), but on December 27, 1999, the Sheriff terminated her (*Appendix 46*) without any pre-termination hearing as required by § 1-7G-3D, A.C.C. (*Appendix A*, p. 352a) and *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487 (1985).

Ms. Gibson appealed the decision pursuant to § 1-7G-3L (*Appendix A*, p. 355a-357a), and requested a hearing. Ms.

Gibson gave notice of the wages she was entitled; asserted her FLSA rights; denied any violation, and notified Sheriff Killeen her voucher even for August 1999 was in error like all others. Legal counsel for Ada County sent correspondence about the voucher (*Appendix 45*). The historic practice had always been unless the voucher was signed there would be no pay. Ada County refused to compensate Ms. Gibson for which she was entitled. The Sheriff rejected pay reduction as authorized by § 1-7C-6B, A.C.C. (*Appendix A*, p. 320a-321a).

Through discovery (*Appendix A*, p. 355a-357a, Ms. Gibson attempted to secure evidence of her termination, and sought information relating to the wage record-keeping, and how the departments created errors and overpayments. The Ada County Personnel Hearing Officer denied Ms. Gibson access to that relevant information.

Dr. Spencer notified the State Board of Medicine the distorted information and conduct of County officials, including their destruction of Dr. Steuart's medical records created October 5, 1999 (*Appendix 44*).

The County acknowledged Ms. Gibson was owed **some** compensation and the Sheriff authorized some limited wages(*Appendix 68, Exhibit A*, p. 458a).

Ultimately, Ms. Gibson was diagnosed as having sustained a severe Post-Traumatic Stress Disorder (PTSD) (*Appendix 14*).

STATEMENT OF FACTS, DOCKET NO. 30976 – WRONGFUL TERMINATION AND DENIAL OF DUE PROCESS

The hearing Ms. Gibson received before the Ada County Personnel Hearing Officer, was held January 25th and 26th, 2000. On February 15, 2000, the Officer sustained the termination. That decision was appealed to the district court from instructions in § 1-7G-3O, A.C.C. (*Appendix A*, p. 358a).

The court sustained the termination. Appeal was taken to the Idaho Supreme Court, Docket No. 27605, and on May 28, 2003, their decision in *Gibson v. Ada County Sheriff's Department*, 139 Idaho 5, 72 P.3d 845 (2003) (*Appendix 38*), vacated the judgment and ordered the matter dismissed, without prejudice, and therein stated:

> "Notably, had Gibson appealed the county personnel hearing officer's decision to the Ada County Board of Commissioners (board), the decision would be an appropriate subject for judicial review and the IAPA [*Idaho Administrative Procedures Act*] standard of review would apply. I.C. § 31-1506(1). Without action of the board, however, the judicial review provisions of I.C. § 31-1506(1) are inapplicable" (*Appendix 38*, p. 224a).
>
> "ACC § 1-7G-3 (o) is not a "statute" within the meaning of (I.R.C.P.) 84 [Idaho Rule of Civil Procedure] (*Appendix H*), and thus cannot authorize judicial review. Because ACC § 1-7G-3 (o) is not a statute, yet it attempts to authorize judicial review of a personnel hearing officer's decision, it conflicts with I.R.C.P. 84 and is, therefore, infirm" (*Appendix 38*, p. 225a).
>
> "The ACSD [Ada County Sheriff's Department] has not prevailed on the merits in this matter. In fact, it is the infirm appeal provision of A.C.C. § 1-7G-3 (o), incorrectly instructing Gibson to appeal the decision of the county personnel hearing officer to the district court, which has prevented this Court from addressing the merits of this matter. As a result, the matter is dismissed *without prejudice* and the ACSD is not a prevailing party..." (Emphasis added). (*Appendix 38*, p. 227a).

From that Decision, Ms. Gibson submitted her Petition June 4, 2003 to the County Commissioners, requesting hearing and review of her termination. On July 2, 2003, Ada County denied Ms. Gibson a hearing (*Appendix 37*) and stated:

> "Thus, this Board is without legal authority to review Sheriff Killeen's termination of Ms. Gibson's employment with the Ada County Sheriff's Office. *See, Barth v. Canyon County*, 128 Idaho 707 (1996)", and
>
> "The Idaho Supreme Court decision in *Gibson v. Ada County Sheriff's Department*, Docket No. 27605, mentions an appeal of the Personnel Hearing Officer decision to the Board of County Commissioners. However, this would only apply in the instance of an employee under the Board of County Commissioners, rather than under a different elected official".

Not only was hearing required from *Gibson v. Ada County Sheriff's Department*, (*Appendix 38*), but the County's ordinance had been changed 20 years before to hold an elected official's decision was no longer final.

Ada County's ordinance-evolution process began with Ordinance No. 110, December 10, 1980, because Public Law 96-170 was enacted December 29, 1979 (involving Title 42, U.S.C. § 1983). That created modifications to federal legislation on constitutional and statutory rights. The change was designed to protect employees. That was Ada County's attempt to alleviate "finality" of termination imposed by an elected official, and correct denials of due process, under color of law. Specific historic details are found in *Appendix 24*.

Ms. Gibson requested the County reconsider, as a hearing is **authorized** by Chapter 14 (§ 1-14-1 through § 1-14-8), A.C.C. (*Appendix B*), and § 67-2345(1)(b), *Idaho Code* (*Appendix F*). No response was forthcoming. Ms. Gibson filed Petition for **Judicial Review** with the court to address the denial of her procedural right.

Ms. Gibson submitted motion requesting remand to the Commissioners, requiring an agency record, with evidence and a **final decision and order**. The lower court entered an Order (*Appendix 29*), that directed the County transmit the

entire record (*Appendix 29*, p. 186a-187a). The County transmitted no record (*Appendix 37*). The lower court never addressed the deficiency of a record. *See* Rule 84(n), I.R.C.P.; § 67-5275, § 67-5276 and § 67-5277, *Idaho Code*.

The lower court entered an Interlocutory Order Denying Ms. Gibson's Petition for Judicial Review (*Appendix 23*), but granted thirty (30) days to make common law claims (*Appendix 23*, p. 148a). Ms. Gibson filed a Petition and Amended Petition for Permissive Appeal to the Idaho Supreme Court, who denied the petition, mistakenly stating it was "dismissed, as it is from a **final order** and is not timely" (*Appendix 21*). It was not a final order, and later recognized as interlocutory by the courts.

Judge McKee recused himself, and Judge Joel D. Horton, assigned (*Appendix 22*). A "final order" was entered, from which an appeal was taken to the Idaho Supreme Court under Docket No. 30976 (*Appendix 20*). Relief was denied.

STATEMENT OF FACTS, DOCKET NO. 31553 – DENIAL OF STATUTORY RIGHT OF ACTION, *FAIR LABOR STANDARDS ACT*, 29 U.S.C. § 216(b)

Ms. Gibson demanded wages she was entitled (*Appendix 43*). No disbursement was forthcoming. Ms. Gibson contacted Idaho Department of Labor to collect those wages. The Director, advised he had no authority to investigate claims against public agencies, and Ms. Gibson must seek recovery under the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq*. (*Appendix 42*).

Before Petitioner filed her civil rights suit in Docket No. 29694, Ada County filed suit alleging "mistaken receipt of monies" and requested $8,528.89.

Ms. Gibson filed her answer and counterclaim, providing facts surrounding her employment, rights, protection, and immunities under the County Merit System, § 1-7-1 through § 1-7L-10, A.C.C. (*Appendix A*), and the federal protection

afforded by FLSA in her contract, and "**right of action**" under FLSA, pursuant to the statutory scheme contained in § 1-7C-1, A.C.C. (*Appendix A*, p. 316a) and under federal law.

The lower court denied Ms. Gibson's motion to dismiss the complaint (*Appendix 19 & 36*), and denied Ms. Gibson her right to amend her counterclaim. The effect allowed the County to escape judicial enforcement of statutory and constitutional rights, and allow the County escape imposition of sanctions (liquidated damages) mandated under FLSA for wage and record-keeping violations, and serve to create a sanctuary to insulate it from the wrongful termination, and ongoing violations of federal law (FLSA). It denied Ms. Gibson her **statutory right to a cause of action** under FLSA § 216(b).

Ms. Gibson filed motion to reconsider, was denied, and Ms. Gibson filed motion for permissive appeal to the Idaho Supreme Court (*Appendix 31 & 32*), and demonstrated the manner by which federal courts ruled on employment rights, including FLSA cannot be construed in a narrow manner; the employer is responsible for "knowledge" and "management" of FLSA which compels it make, keep and preserve **accurate** employee wage records; the employer cannot transfer responsibility to the employee; the employer is statutorily subject to all restrictions, ramifications and sanctions provided in FLSA, and the employee has a "right of action" pursuant to § 216(b), FLSA (*Appendix 31*, p. 194a-199a & *Appendix 32*, p. 203a.

The district court withdrew its Order (*Appendix 25 & 30*), and allowed Ms. Gibson file an amended counterclaim.

Petitioner filed the amended counterclaim (*Appendix 73*), alleging the violations of FLSA, including § 211(c) (record-keeping), § 207(k) (misclassification of overtime), and §215(a)(3) (discrimination and retaliation).

The court dismissed Ms. Gibson's claim (*Appendix 19*) and the County moved for summary judgment, supported by

affidavit (*Appendix 68*), attesting Ms. Gibson was mistakenly paid $8,528.89 between October 1998 and June 1999. Ms. Gibson submitted her affidavit (Appendix 67) showing the County's lack of true reconciliation of wages prior to any "mistaken receipt of funds" and the wrongful "leave" issue, and that only after a full reconciliation (due to 211(c) and 207(k) violations), could the court address an accounting.

The County submitted supplemental affidavits (*Appendix 65 & 66*), discussing again **only** wages paid, and how $8,528.89 was calculated (*Appendix 65, 66 & 67*). The County avoided the issue of wages **owed** Ms. Gibson or willful § 207(k) misclassification, or the wrongful leave status.

Ms. Gibson sought permissive appeal to the Idaho Supreme Court (*Appendix 17 & 18*); the district court granted judgment against Ms. Gibson (*Appendix 15 & 16*), from which the appeal was taken to the Idaho Supreme Court under Docket No. 31553, and relief was denied.

STATEMENT OF FACTS, DOCKET NO. 29694 – VIOLATION OF CIVIL RIGHTS, 42 U.S.C. § 1983

Petitioner initiated a Title 42 action on July 19, 2002 because Ada County officials, under color of law, threatened malicious prosecution on a fictitious charge of grand theft because Ms. Gibson refused to resign her employment, was then denied a pre-termination *Loudermill* hearing, failed to provide compensation during temporary leave status, refused to pay wages owed her, and took her property right of employment without due process of law.

The district court (*Appendix 35*) not only dismissed Ms. Gibson's action, but did so **with prejudice**, asserting the statute of limitations expired February 15, 2002, two years after the Hearing Officer's decision. Ms. Gibson objected (*Appendix 34*), and the lower court overruled the objection

(*Appendix 33*). Appeal was taken to the Idaho Supreme Court under Docket No. 29694, and relief was denied.

REASONS FOR GRANTING PETITION

Docket No. 30976 – Wrongful Termination And Denial Of Due Process

Ms. Gibson was never provided a pre-termination hearing required under *Loudermill*, but Idaho's Supreme Court insists "Gibson was given a pre-termination hearing by way of the hearing conducted on February 15, 2000" (*Appendix 1*, p. 16a). Ms. Gibson was never provided a "pre-termination" procedure, and the February 15, 2000 "hearing" (actually January 25th & 26th, 2000), occurred after she was terminated December 27, 1999. The U.S. Supreme Court in *Loudermill* held that although an employee had a "constitutionally adequate" post-termination hearing, it did not remedy a **constitutionally inadequate** pre-termination hearing. Post-termination hearings, no matter how elaborate, do not relieve the employer of providing the pre-termination procedural protections noted in *Loudermill*. *See McNulty v. Sandoval County*, No. CIV 05-221 BB/ACT, United States District Court, D. New Mexico, August 15, 2005.

The 9th Circuit Court of Appeals certified questions concerning firing and merit systems and addressed that in the matter of *Hansen v. White*, 947 F.2d 1378. The Idaho Supreme Court in *Hansen v. White*, 114 Idaho 907, 762 P.2d 820 (1988), addressed the subject when an elected sheriff may terminate a deputy, after county commissioners enact a merit system that protects classified employees.

Hansen (114 Idaho 907) stated (at page 911):

> "The board of county commissioners has the statutory authority to create a reasonable county merit system, and such an act is a valid legislative exercise of its express power to promote the general welfare of the county".

"Thus, once a deputy attains "permanent" status under the merit system, the deputy is no longer an employee "at will." Consequently, the sheriff's implied power to terminate employees without cause, which arises from the common law, not the constitution, is superceded by the merit system." (at page 913). (Emphasis added).

Under a merit system (pursuant to *Idaho Code*, § 31-714) (*Appendix E*), a classified employee can be terminated only for "good cause", and must have a right to procedural due process, equal protection and judicial review of that property right.

The Idaho Supreme Court acknowledged Ms Gibson was a tenured employee, terminable only for cause (*Appendix 1*, p. 3a & *Appendix 38*, p. 219a), yet denying her due process; she was treated as if she were an "at-will" employee.

Historically, Idaho courts determined, unless review and appeal is allowed to a court, "due process has not been satisfied and is denied." *See State v. Finch*, 79 Idaho 275, 315 P.2d 529 (1957); *Foster v. Walus*, 81 Idaho 452, 347 P.2d 120 (1959); and *Graves v. Cogswell*, 97 Idaho 716, 552 P.2d 224 (1976).

As Idaho before noted in *Finch*, *supra*:

"It should always be kept in mind that the evil of administrative action which must be guarded against is not the fact-finding power, but the conclusiveness of the fact-finding power coupled with the order based on the findings made which would deprive a person of property rights". (Emphasis added).

As Idaho before noted in *Foster*, supra:

"administrative decisions cannot be vested with such finality as to deny to the judicial department its power to afford protection of vested property and constitutional rights." (*Foster*, *Id.* at p. 458). (Emphasis added).

"Where either constitutional or vested property rights are involved the judicial department of the government

must afford a remedy for the protection of such rights". (*Foster*, *Id*, at p. 458). (Emphasis added).

"Where constitutionally protected rights of person or property are dependent upon a judicial review of findings of fact made by an administrative tribunal, that review must be had in a court having the facilities as well as the authority to re-examine the facts and make its own findings, when necessary to the preservation of such rights." *Foster*, *Id* at 458; *see also Finch*, supra, at p. 458. (Emphasis added).

No finality can be given to an administrative agency, let alone bestowed on an elected official, where constitutional rights are involved. There must be a right to adequate judicial review, to address due process as stated before in *Finch*, supra; *Foster*, supra; *State v. Concrete Processors, Inc.*, 85 Idaho 277, 379 P.2d 89 (1963); and *Electors of Big Butte Area v. State Board of Ed.*, 78 Idaho 602, 308 P.2d 225 (1957).

Gibson filed her Petition for Certiorari to the Idaho Supreme Court (*Appendix 4 & 5*), commensurate with recent decisions of the federal court. *See McNulty* supra, and *Terlecky v. City of Ruidoso Downs*, No. CIV 04-1121 BB DJS, United States District Court, D. New Mexico, January 24, 2006. The federal courts stated:

"The personnel manual allows an appeal to state district court from decisions of the City Council, although there does not appear to be statutory authorization for such an appeal in the applicable New Mexico statutes". *Terleckey*, p. 4-5.

"It is true that Plaintiff had a remedy available in district court, by way of writ of certiorari, even if there is no statutory authorization for the direct appeal allowed by the City's personnel manual. *See Zamora v. Village of Ruidoso Down*, 907 P.2d 182, 184 (N.M. 1995)". *Terleckey*, p. 7. See also *McNulty*, footnote 5.

"Unless otherwise provided by statute, the correct procedure to appeal a personnel board's administrative decision is to petition the district court for a writ of certiorari". *Zamora*, p. 184.

If a state court refuses an adequate remedy for this due process deprivation, a Federal court will determine whether the Due Process Clause requires a remedy, and will remedy the violation. *See Hicks v. Jackson County Commission*, Civil Action No. CV-03-S-2858-NE, United States District Court, N.D. Alabama, Northeastern Division, June 23, 2005; *McKinney v. Pate*, 20 F.3d 1550 (11th Cir. 1994).

In keeping with the "last overt act" theory, in *McKinney v.Pate*, 20 F.3d 1550, 1557 (11th Cir. 1994) (quoting *Zinermon v.Burch*, 494 U.S. 113, 126, 110 S.Ct. 975, 108 L.Ed.2d 100 (1990)), the court stated:

"[O]nly when the state refuses to provide a process sufficient to remedy the procedural deprivation does a constitutional violation actionable under section 1983 arise." *Id*". *See also Horton v. Bd. Cnty. Com'rs, Flager Cnty*, 202 F.3d 1297 (11th Cir. 2000).

Sheriff Killeen perceived his idea of "good cause" to terminate because Ms. Gibson refused to resign. There were no established standards placing any accounting responsibilities on the employee. To do so would violate FLSA. The Sheriff wanted to ignore the violations of FLSA. Sheriff Killeen terminated Ms. Gibson in retaliation for her refusal to resign, rather than address the Payroll errors, and focus on the need to correct FLSA violations.

Historically, Idaho held "good cause" requires a substantial reason related to **work performance**, and it may not be arbitrary, frivolous, unlawful, or a non-established, vague standard, or lack of announced standards or irrelevant claims to terminate. A classified and tenured employee may not be dismissed for conduct **unrelated** to the **performance** of their **job** or the **welfare of the institution by which he is**

employed. *See Allen v. Lewis-Clark State College*, 105 Idaho 447, 670 P.2d 854 (1983).

By not articulating standards of conduct within § 1-7G-3A, A.C.C. (*Appendix A*, p. 346a-350a), or within § 9.04 of the Policy Manual, there can be no consequence to the employee for payroll overpayments, when unrelated to the employee's job performance. Undefined, undisclosed standards are not enforceable, and payroll errors could not be transferred or delegated, in any event. The employee must be apprised of conduct required before held accountable. Termination without standards or review leaves the termination arbitrary, capricious and unlawful. As Idaho before held, standards are critical to procedural due process. As in *H & V Engineering v. Bd. of Pro. Engineers*, 113 Idaho 646, 747 P.2d 55 (1987) and Tuma v. Board of Nursing, 100 Idaho 74, 593 P.2d 711 (1979), Idaho courts used to historically recognize:

> "The right to practice a chosen profession is a valuable property right which cannot be deprived unless one is provided with the safeguards of due process. *Schware v. Board of Bar Examiners,* 353 U.S. 232, 77 S.Ct. 752, 1 L.Ed.2d 796 (1957) (lawyer); *Tuma v. Board of Nursing,* 100 Idaho 74, 593 P.2d 711 (1979) (nurse); *Ferguson v. Board of Trustees of Bonner County School Dist. No. 82,* 98 Idaho 359, 564 P.2d 971 (1977) (teacher)".
>
> The void-for-vagueness doctrine was before defined in Idaho in *Wyckoff v. Board of County Commissioners of Ada County,* 101 Idaho 12, 15, 607 P.2d 1066, 1069 (1980):
>
> "[A] statute is unconstitutionally vague when its language does not convey sufficiently definite warnings as to the proscribed conduct, and its language is such that men [or women] of common intelligence must necessarily guess at its meaning". (Emphasis added).

Ms. Gibson was terminated without a *Loudermill* hearing, fired, and denied due process for something Payroll did; the Sheriff had not proscribed conduct, definition, or identifiable standard; and balancing a personal account was never part of her job performance or work duty.

Non-permissible reasons to terminate employment will never be sustained by a court's review of employee rights. *See Mt. Healthy City Board of Ed. v. Doyle*, 429 U.S. 274 (1977) and *Allen*, supra.

When a conflict exists about the discharge of an employee for "good cause", the employee is entitled to access the courts and judicial review from any administrative process, and the employer bears the burden of proving the existence of "good cause". *See Hansen v. White*, 947 F.2d 1378 (9th Cir. 1991). When the employee demonstrates the termination was in violation of an employment contract, or protected property rights, the employer bears the burden to prove the existence of good cause for any termination. *Lucas v. Whittaker Corp.*, 470 F.2d 326 (10th Cir. 1972).

Because of litigation with *Gibson,* and with *Woodbridge, Perkins, Gallagher, and Knickerbocker* (each referred to in this Petition), the Commissioners have **now** enacted Ordinance No. 612, amending § 1-7G-3 of the Personnel System (*Appendix C*), to allow termination by an **elected** department official to be **final**, eliminating a classified employee's right to agency review, or access a court for judicial review of the termination imposed, as proceedings cannot come through the *Idaho Administrative Procedures Act* without agency action, a prerequisite for judicial review.

In Idaho, the elected official (Sheriff) is empowered by the board of county commissioners through Article 18, § 6, Idaho Constitution, to **appoint** deputies as the business of their office may require (*Appendix D*). The County has taken the position the right of an elected official to "appoint" deputies goes "hand-in-hand" with the right to

"terminate", contrary to *Hansen v. White*, 947 F.2d 1378 (9th Cir. 1991). In a recent matter of *Clark v. O'Malley, et al.*, Case No. 276, filed June 30, 2006, the Court of Special Appeals of Maryland, held an official empowered to remove a public employee may do so only in accordance with constitutional and statutory provisions providing for removal, and may only be exercised in strict compliance with procedural and substantive provisions.

Docket No. 31553 – Denial of Statutory Right of Action Under Fair Labor Standards Act, § 29 U.S.C. § 216(b)

Sheriff Killeen brought Ms. Gibson into a proceeding under the *Fair Labor Standards Act* when classifying her "7k" exempt, and then into a confrontational proceeding when directing detectives interrogate her, as a result of the County's violations of FLSA, § 211(c), wage record-keeping errors, utilizing incompetent and flawed computer system, and ongoing violations of FLSA, § 207(k), for misuse of the "7k exemption", causing overtime errors.

Protection and right of action was established in Public Law 99-150, Sec. 8, Nov. 13, 1985, 99 Stat. 791, which provided a public agency which "discriminates or has discriminated against an employee with respect to the employee's wages or other terms or conditions of employment because the employee asserted coverage under section 7 of the *Fair Labor Standards Act* (29 U.S.C. § 207), shall be held to have violated section 15(a)(3) of such Act (29 U.S.C. § 215(a)(3)". The protection afforded became available August 1, 1986, for actions described in section 15(a)(3) of the FLSA.

Ada County and its Sheriff continued "7k" violations and attempted retaliatory transfer of accounting responsibility by use of a "pay voucher" containing a waiver, in violation of their duty to keep and maintain accurate wage records under § 211(c) and correct application of § 207(k), throughout all

duration of Ms. Gibson's employment. These violations constitute independent violations of the *Fair Labor Standards Act*, § 215(a)(2), § 215(a)(3), and § 215(a)(5).

The "accurate record-keeping" duty is placed **solely** upon the employer, and any attempt to transfer that responsibility remains the employer's peril. *See Goldberg v Cockrell*, 303 F2d 811 (CA5 Miss., 1962). *See also* Title 29, U.S.C. § 211; Fact Sheet No. 021, U.S. Department of Labor, Wage and Hour Division, and Code of Federal Regulations, Title 29, §§ 516.1 and 516.2.

The employer **cannot** transfer this statutory obligation under § 211(c), to the employee **for any reason**. *See Caserta v Home Lines Agency, Inc.*, 273 F2d 943 (CA2 NY, 1959). The responsibilities imposed by § 211(c) belong solely to the employer, and cannot escape responsibility with efforts to delegate that record-keeping to the employee. *See Wirtz v Mississippi Publishers Corp.*, 364 F2d 603(CA5 Miss., 1966); *Andrews v Montgomery Ward & Co.*, 30 F Supp 380 (DC Ill., 1939), and *Walling v Sun Pub. Co.*, 47 F Supp 180 (DC Tenn., 1942); *Hodgson v General Motors Acceptance Corp.*, 347 F Supp 9 (DC Fla., 1972), affd (CA 5 Fla) 482 F2d 825.

Ada County was non-compliant with FLSA, long before Ms. Gibson became employed, confirmed by former County Commissioner, Sharon M. Ullman (*Appendix 39*), where she referred to the County's letter (*Appendix 41*), that included doing nothing about it.

As concerns were mounting over FLSA violations, the County began a "new payroll system" December 16, 2001 and the Sheriff advised employees wage calculations (still) "will not be accurate" (*Appendix 40*) The concept of the "pay voucher endorsement" was abandoned. This change became effective *circa* January 10, 2002. The "pay voucher" prior to January 10, 2002, violated FLSA, as the voucher was designed for use as a "waiver", if "errors" were not brought to the

attention of Payroll within five (5) days after an employee placed signature on the document. *See Appendix 1*, p. 3a & *Appendix 38*, p. 219a.

This FLSA violation existed in 1994, identified in *Ken Woodbridge and Bob Perkins v County of Ada*, Case No. 95957, Fourth District Court, Ada County. The court found Ada County violated FLSA.

After Ms. Gibson was terminated, Ralph Gallagher initiated litigation against Ada County March 15, 2002, because of ongoing violations of FLSA, § 207(k), and challenged retaliatory termination of his employment. *See Gallagher v. Ada County et al*, 4th DC, Case No. CVOC 0202022D (*Appendix 17*, p. 98a). Ada County settled with Mr. Gallagher out of court and paid $70,000.00 because of their misconduct.

On March 2, 2004, the Commissioners met to discuss wrongful classification of Jail Technicians under § 207(k), and allocated funds to reimburse Jail Technicians.

On June 1, 2004, Ada County gave $52,593.17 to 64 individuals employed as Jail Technicians. *See Knickerbocker, et al, v. Ada County, Idaho*, Case No. CV 04-288-S-BLW, U.S. District Court, District of Idaho, Answer to Interrogatory No. 12 & No. 13, Docket No. 21-5, p. 7-8, filed February 11, 2005 (*Appendix 58, 59, 60, 61, 62, 63 & 64*). These Jail Technicians were sent a check and letter (*Appendix 58*), accompanied by a "release" and "waiver" form, seeking to preclude them from utilizing their FLSA "right of action" to pursue sanctions, liquidated damages, costs and fees, under the FLSA (*Appendix 69 & 70*). Such waivers are against public policy, *null and void.* Once this information became known to Ms. Gibson, she requested pay in an equitable manner for the County's violation of FLSA § 207(k) (*Appendix71*). Receiving no response, a letter was sent to legal counsel for Ada County, Ray J. Chacko (*Appendix 72*).

Three Jail Technicians filed suit against the County in federal court for intentionally classifying them exempt under FLSA § 207(k). *See Knickerbocker, et al, v. Ada County, Idaho*, Case No. CV 04-288-S-BLW, U.S. District Court, District of Idaho (*Appendix 58, 59, 60, 61, 62, 63 & 64*). During discovery, Ada County confirmed jail technicians were classified exempt sometime between 1993 to 1995. *See Knickerbocker, et al, v. Ada County, Idaho*, Answer to Interrogatory No. 3, Docket No. 21-5, p. 3, filed February 11, 2005 (*Appendix 60*). Statement of Relevant Facts (Document No. 56, p. 3-5) in *Knickerbocker, et al, v. Ada County, Idaho*, Case No. CV 04-288-S-BLW, U.S. District Court, District of Idaho, filed March 13, 2006.

The court certified class-action status (*Appendix 58*) for prospective plaintiffs as a collective action under FLSA § 216(b), due to the County's **willful** violation of § 207(k), and allowed back pay, liquidated damages and interest for three years, due to the ongoing willful violation.

The affidavits of Kelli Bolicek and Cheryl Bower (*Appendix 65, 66 & 68*), made no mention of wages due Ms. Gibson for wrongful exemption under § 207(k). In *Knickerbocker*, when the County was asked to identify all persons who participated "to compensate these law enforcement personnel as if they had worked on a forty (40) hour per week schedule", Kelli Bolicek was listed in subparagraph "b", Vaughn Killen was listed in subparagraph "g", and the Board was listed in subparagraphs "h", "i" and "j" (*Appendix 61*). *See also Appendix 58, 59, 60, 62, 63 & 64*.

The County's complaint of November 7, 2001 alleged Ms. Gibson owed the County $8,528.89, even though the County knew it owed back compensation to her for § 211(c) and § 207(k) violations, as was addressed in Count I, II, III and IV of Ms. Gibson's amended counterclaim (*Appendix 73*, p. 500a-509a) that was dismissed (*Appendix 19*).

Ada County may not maintain an inefficient accounting procedure and claim no responsibility due to incompetent system(s). *See Dominici v Board of Education of the City of Chicago*, 881 F Supp. 315, p. 315, 316 and 320 (N.D. Ill. 1995).

Ms. Gibson has never waived her right of action, as the law on waiver was settled in *Brooklyn Bank v. O'Neil*, 324 U.S. 697, p. 697 and 705 (1945). The United States Supreme Court addressed FLSA and ruled the employee's inability to waive rights:

> "An employee's *release* and *waiver* of *rights* to minimum wages and liquidated damages under the Fair Labor Standards Act, in consideration of a sum known by both employer and employee to be less than statutory minimum wages due, is *void*", and;
>
> "a *statutory right* conferred on a private party, but affecting the public interest, *may not* be *waived* or *released* if such waiver or release contravenes the statutory policy". (Emphasis added).

Docket No. 29694 – Violation Of Petitioner's Civil Rights Under 42 U.S.C. § 1983

During the earlier dispute of *Gibson v. Ada County*, 138 Idaho 787, 69 P.3d 1048 (2003), concerning Ada County's refusal to provide Ms. Gibson public records pursuant to the *Idaho Public Records Act*, *Idaho Code*, § 9-337 *et seq.* (concerning employment matters), during appellate oral argument (December 11, 2002), the court asked about the Sheriff's criminal investigation concerning Ms. Gibson, and counsel for Ada County stated:

> ".....the statute of limitations would still not have run. Additional information found currently may still create an ongoing situation for that file.....", and "the statute of limitations had not run, and charges still could have been

filed had the discovery of further information made that appropriate" (continuing threat of prosecution).

In *Thompson v. City of Shasta Lake*, No. Civ. S-03-2513 LKK/KJM, April 28, 2004 (E.D. Cal. 2004), a Title 42 U.S.C. § 1983 case, the court stated (at page 12):

> "Under federal law, a cause of action generally accrues when the plaintiff "knows or has reason to know of the injury which is the basis of the action".
>
> "In this Circuit (9th Cir.), ...the statute of limitations does not accrue until the criminal charges against the plaintiff seeking to bring the § 1983 action are resolved". *See also Heck v. Humphrey*, 512 U.S. 477 (1994), and cited in *Thompson v. City of Shasta Lake*, supra.

In *Pounds v. Denison*, 115 Idaho 381, 384, 766 P.2d 1262, 1264 p. 383-384 (1988) the Idaho court before held:

> "We deem it equally true that the *procedures* of the *Act must be followed* to *exhaust the administrative remedies* offered before a *classified employee may sue upon a claim pertaining to his employment*."
>
> "Where an administrative remedy is provided by statute, *relief must* be *sought* from the *administrative body* and *this remedy exhausted before the courts will act*. Absent a statutory exception, the exhaustion of an *administrative remedy* is a *prerequisite* for resort to the courts."

Only once Ms. Gibson could demonstrate a final **agency** order of termination, could she have injury and accrued claim against Ada County for permanent injuries inflicted upon her, and permanently deprived of her property rights encompassed by the Fourteenth Amendment protection announced in *Board of Regents vs. Roth*, 408 U.S. 564, 569 (1972). A Title 42 claim generally accrues when a person knows or has reason to know the actual injury attributable to the "last overt act" forming the basis of the claim. If no pre-termination hearings, no agency hearings and no right to

judicial review, the statute of limitations should not commence, as the termination is not from an agency order, and no denial of an agency review was announced until July 2, 2003 (*Appendix 37*), when the Board of Commissioners **refused** to provide Ms. Gibson a **due process administrative review hearing**, after the other established due process format had been rendered "infirm" by the Idaho Supreme Court. If the agency refuses to establish a valid review process, or refuses to conduct an administrative hearing to comply with the mandated due process requirements, the available avenues contemplated cannot be exhausted.

The termination must become administratively final. *See Hoesterey vs. City of Cathedral City*, 945 F.2d 317 (9th Cir. 1991). *See also McCoy vs. San Francisco, City & County*, 14 F.3d 28 (9th Cir. 1994), and *Hill vs. State of Tenn.*, 868 F. Supp. 221 (1994). Ms. Gibson's termination could not become final until an administrative process by the agency has run its course

> Again, in keeping with the "last overt act" theory, in *McKinney v.Pate*, 20 F.3d 1550, 1557 (11th Cir. 1994) (quoting *Zinermon v.Burch*, 494 U.S. 113, 126, 110 S.Ct. 975, 108 L.Ed.2d 100 (1990)), the court stated:
>
> "[O]nly when the state refuses to provide a process sufficient to remedy the procedural deprivation does a constitutional violation actionable under section 1983 arise." *Id*". *See also Horton v. Bd. Cnty. Com'rs, Flager Cnty*, 202 F.3d 1297 (11th Cir. 2000).

The Personnel System (Merit System), § 1-7-1 through § 1-7L-10, A.C.C., conferred upon Ms. Gibson a legitimate entitlement and benefit of a property right in employment, wages, and benefits owed her (*Appendix A*). Once she attained classified tenured employee status, she had the right to continued employment and compensation for wages and benefits owed, and an unqualified right to procedural due

process concerning **all** property rights. Ada County, and our Idaho courts, have taken what can only be seen as a strong pro-employer position, raising concern as to their regard for these federal enactments. They seek to deprive Ms. Gibson's rights, expectations of continued employment, wage and benefits, and procedural due process, now hindered entirely under color of law. *See Pappas v. City of Lebanon*, 331 F. Supp. 2d 311~~; August 16~~, 2004 (M.D. Pa. 2004).

The anti-retaliation provisions of FLSA prohibit Ada County from interfering with Ms. Gibson's "unfettered access" to the remedial mechanisms to which she is entitled under FLSA, and intended to deter County conduct of discriminating, retaliating and interfering with her efforts to advance enforcement under FLSA. The provisions are not confined to harm related to Ms. Gibson's employment, or actions that occurred strictly at the workplace. *See Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. ___ (2006). As in *Berry v. Stevinson Chevrolet*, 74 F.3d 980, 984, 986 (CA10 1996), Ada County committed actionable retaliation when threatening prosecution for grand theft if Ms. Gibson did not resign, and requesting false criminal charges be filed against her. That materially adverse treatment was based on a retaliatory motive of the Sheriff, in a fashion reasonably likely to deter Ms. Gibson from engaging in protected FLSA activity, and seeking to gain her voluntary resignation of her employment career.

Ms. Gibson had been unemployed for over one year following the County's conduct, and suffers a severe and permanent PTSD condition as a result of this "adverse employment action" pursued by County officials. *See Burlington Northern & Santa Fe Railway Co. v. White*, supra. Such harm and damage caused by Ada County was not confined to Ms. Gibson's related County employment or damage suffered at the workplace. Ada County cannot avoid liability in this circumstance, as Ms. Gibson has been

victimized, and entitled to recover damages to compensate her.

CONCLUSION

On July 11, 2006 the U.S. Court of Appeals for the District of Columbia Circuit in the Indian Trust Fund (*Cobell, et al. v. Kempthorne, et al.*, Case No. 05-5269), held (p. 15):

> "This case serves as an appalling reminder of the evils that result when large numbers of the politically powerless are placed at the mercy of institutions engendered and controlled by a politically powerful few. It reminds us that even today our great democratic enterprise remains unfinished. And it reminds us, finally, that the terrible power of government, and the frailty of the restraints on the exercise of that power, are never revealed until government turns against the people."

In the Annual County Benefit Survey, April 2006, the Idaho Association of Counties (IAC) confirmed Ada County is a public employer of 1,345 full-time employees. If Ada County is allowed to continue retaliation, discrimination, and denial, despite FLSA as they have done against Ms. Gibson, those 1,345 County employees will be at the mercy of a governmental agency that has a history of FLSA violations..

Based upon the facts presented, Petitioner requests this Court grant her Petition For Writ Of Certiorari on all issues presented.

Respectfully submitted,

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Attorney For Petitioner

Supreme Court, U.S.
FILED

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No. 06-

IN THE

Supreme Court of the United States

STACY A. GIBSON,

Petitioner,

v.

ADA COUNTY, *et al*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IDAHO

PETITION FOR WRIT OF CERTIORARI

APPENDIX – VOLUME I

APPENDICES No. 1 – No. 57

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TABLE OF APPENDICES – VOLUME I

Page

APPENDIX 1 – Opinion Of The Idaho Supreme Court, Filed February 9, 2006..... 1a

APPENDIX 2 – Order Of The Idaho Supreme Court Denying Petition For Rehearing, Filed May 9, 2006..... 32a

APPENDIX 3 – Order Of The Idaho Supreme Court Denying Petition For Writ Of Certiorari, Filed April 25, 2006..... 34a

APPENDIX 4 – Memorandum In Support Of Verified Petition For Writ Of Certiorari, Filed March 22, 2006..... 36a

APPENDIX 5 – Verified Petition For Writ Of Certiorari, Filed March 22, 2006..... 49a

APPENDIX 6 – Remittitur From The Idaho Supreme Court To The Fourth Judicial District, County Of Ada, Filed May 9, 2006..... 60a

APPENDIX 7 – Order Of The Idaho Supreme Court Awarding Costs And Attorney Fees, Filed May 12, 2006..... 63a

APPENDIX 8 – Order For Judgment Entered By Judge Ronald J. Wilper, Fourth District Court (Docket No. 31553), Filed May 25, 2006..... 65a

APPENDIX 9 – Judgment For Costs Entered By Judge Ronald J. Wilper, Fourth District Court (Docket No. 29694), Filed May 25, 2006..... 66a

Table Of Appendices

Page

APPENDIX 10 – Judgment For Fees And Costs Entered By Judge Ronald J. Wilper, Fourth District Court (Docket No. 31553), Filed May 19, 2006..... 67a

APPENDIX 11 – Order For Judgment Entered By Judge Ronald J. Wilper, Fourth District Court (Docket No. 29694) Filed May 19, 2006..... 68a

APPENDIX 12 - Order For Judgment Entered By Judge Joel Horton, Fourth District Court (Docket No. 30976), Filed May 19, 2006..... 69a

APPENDIX 13 – Judgment For Fees And Costs Entered By Judge Joel Horton, Fourth District Court (Docket No. 30976), Filed May 19, 2006..... 70a

APPENDIX 14 – Medical Records of F. LaMarr Heyrend, M.D. Dated June 23, 2005, Verifying Gibson Suffers Psychological Workplace Injury (PTSD Diagnosis) Caused By Ada County's Conduct..... 71a

APPENDIX 15 – Judgment On Motion For Summary Judgment And Motion To Strike Entered By Judge Ronald J. Wilper, Fourth District Court (Docket No. 31553), Filed December 16, 2004..... 86a

APPENDIX 16 –Decision And Order Granting [Ada County] Motion For Summary Judgment Entered By Judge Ronald J. Wilper, Fourth District Court (Docket No. 31553), Filed December 10, 2004..... 88a

Table Of Appendices

Page

APPENDIX 17 – Memorandum In Support Of [Gibson] Motion For Permission To Appeal From District Court's Interlocutory Order Entered September 16, 2004 By Judge Ronald J. Wilper, Fourth District Court (Docket No. 31553), Lodged December 9, 2004..... 92a

APPENDIX 18 – [Gibson] Motion For Permission To Appeal From District Court's Interlocutory Order Entered September 16, 2004 By Judge Judge Ronald J. Wilper, Fourth District Court (Docket No. 31553), Filed December 9, 2004..... 127a

APPENDIX 19 – Order Denying [Gibson] Motion To Dismiss And Granting [Ada County] Motion To Dismiss Entered By Judge Ronald J. Wilper, Fourth District Court (Docket No. 31553), Filed September 16, 2004..... 132a

APPENDIX 20 – Order On Renewed Motion For Reconsideration And Final Order Denying Petition For Judicial Review Entered By Judge Joel Horton, Fourth District Court (Docket No. 30976), Filed June 17, 2004..... 139a

APPENDIX 21 – Order Of The Idaho Supreme Court, Erroneously Ruling The February 27, 2004 Interlocutory Order Was "Final" Order, And Dismissing Permissive Appeal As Untimely, Filed May 26, 2004..... 143a

APPENDIX 22 – Notice of Reassignment, Filed April 22, 2004..... 145a

Table Of Appendices

Page

APPENDIX 23 – Order Denying Petition For Judicial Review And Motion To Remand Case Entered By Judge D. Duff McKee, Fourth District Court (Docket No. 30976), Filed February 27, 2004..... 146a

APPENDIX 24 – Memorandum [Historical Analysis of Ada County Merit System] In Support Of Motion To Reconsider Interlocutory Order Conditionally Denying And Dismissing Petition For Judicial Review, With Leave to Amend, Lodged January 30, 2004..... 149a

APPENDIX 25 – Supplemental Order Entered By Judge Ronald J. Wilper, Fourth District Court (Docket No. 31553), Filed January 5, 2004..... 154a

APPENDIX 26 – Order Of The Idaho Supreme Court Denying Petition For Writ(s) Of Mandamus (Docket No. 30976), Filed October 17, 2003..... 156a

APPENDIX 27 – Memorandum In Support Of Petition For Writ(s) Of Mandamus, Filed September 5, 2003..... 158a

APPENDIX 28 – Verified Petition For Writ(s) Of Mandamus, Filed September 5, 2003..... 174a

APPENDIX 29 – Order Governing Judicial Review Entered By Judge D. Duff McKee, Fourth District Court (Docket No. 30976), Filed August 20, 2003... 186a

Table Of Appendices

Page

APPENDIX 30 – Order Withdrawing Order Denying Motion For Reconsideration And Order Entered By Judge Ronald J. Wilper, Fourth District Court (Docket No. 31553), Filed June 11, 2003..... 188a

APPENDIX 31 – Memorandum In Support Of [Gibson] Motion For Permission To Appeal From District Court's Interlocutory Order Entered February 19, 2003 By Judge Ronald J. Wilper, Fourth District Court (Docket No. 31553), Lodged May 16, 2003..... 190a

APPENDIX 32 – [Gibson] Motion For Permission To Appeal From District Court's Interlocutory Order Entered February 19, 2003 By Judge Ronald J. Wilper, Fourth District Court (Docket No. 31553), Filed May 2, 2003 ..... 201a

APPENDIX 33 – Order Overruling Objection To Proposed Judgment Entered By Judge Ronald J. Wilper, Fourth District Court (Docket No. 29694), Filed March 5, 2003..... 207a

APPENDIX 34 – [Gibson] Objection to Proposed Order And Judgment, Filed February 19, 2003.... 208a

APPENDIX 35 – Order And Judgment Entered By Judge Ronald J. Wilper, Fourth District Court (Docket No. 29694), Filed February 19, 2003..... 212a

APPENDIX 36 – Order Entered By Judge Ronald J. Wilper, Fourth District Court (Docket No. 31553), Filed February 19, 2003 ..... 214a

Table Of Appendices

Page

APPENDIX 37 – Letter From Ada County Board Of Commissioners Dated July 2, 2003, Denying Petitioner The Right To A Due Process Hearing To Address The Wrongful Termination Of Her Classified Employment 216a

APPENDIX 38 – Opinion Of The Idaho Supreme Court, Filed May 28, 2003..... 218a

APPENDIX 39 – Affidavit Of Former Ada County Commissioner, Sharon M. Ullman, Dated January 30, 2003, Verifying Ada County's Ongoing FLSA Noncompliance And Need To Address The Matter... 228a

APPENDIX 40 – Memorandum Regarding New Payroll System From Ada County Sheriff, Vaughn Killeen, To All Sheriff's Office Personnel, Dated January 9, 2002..... 232a

APPENDIX 41 –Letter From The Ada County Prosecutor's Office To The Board Of Ada County Commissioners Dated February 12, 2001, Regarding Need For County Compliance With FLSA..... 234a

APPENDIX 42 – Letter To Petitioner From Director Of Idaho Department Of Labor, Roger B. Madsen, Dated February 23, 2000, Stating The Department Has No Authority To Investigate Wage Claims Against Public Agencies [Ada County], And Gibson Should Seek Recovery Under Provisions Of The Fair Labor Standards Act, 29 U.S.C. § 201 *et seq*..... 241a

Table Of Appendices

Page

APPENDIX 43 – Letter From Petitioner's Counsel To Ada County Sheriff Dated February 18, 2000, Demanding Ada County Pay Petitioner All Wages To Which She Is Entitled, Including Earnings Owed From County's Breach Of The Employment Contract..... 243a

APPENDIX 44 – Letter From Stephen E. Spencer, M.D. To Idaho State Board Of Medicine, Dated February 3, 2000, Advising The Sheriff's Legal Advisor, R. Monte MacConnell, Was Intentionally Distorting Information Concerning Gibson..... 244a

APPENDIX 45 – Letter From Ada County Prosecutor's Office To Petitioner's Counsel Dated January 7, 2000, Addressing Appeal Provisions Of Ada County Merit System, Claiming Petitioner Was Obligated To Sign Payroll Vouchers Within Five Days, And Denying Petitioner Wages After August 24, 1999..... 246a

APPENDIX 46 – Letter From Ada County Sheriff, Vaughn Killeen, Dated December 27, 1999, Misrepresenting Facts And Due Process Provisions Of Ada County Code (Merit System), And Terminating Petitioner's Classified Employment Without Providing Petitioner A *Loudermill* Due Process Hearing..... 249a

APPENDIX 47 – Medical Records From Stephen E. Spencer, M.D. Dated November 12, 1999,

Table Of Appendices

Page

Verifying Gibson Was Medically Incapable Of Defending Herself Against Allegations Made By The Sheriff..... 252a

APPENDIX 48 – Letter From Sheriff's Legal Advisor, R. Monte MacConnell, Dated August 25, 1999, Placing Gibson On Administrative Leave Without Pay, In Violation Of Ada County Code, § 1-7G-3B (5), And Terminating Petitioner's Medical Benefits..... 254a

APPENDIX 49 – Letter From Gibson's Counsel To The Sheriff's Legal Advisor, Dated August 24, 1999, Addressing What Conditions Gibson Would Consent To Administrative Leave Without Pay..... 256a

APPENDIX 50 – Medical Records From Stephen E. Spencer, M.D. Dated August 20, 1999, Verifying Gibson's Medical Condition Left Her Unable To Represent Herself..... 258a

APPENDIX 51 –Letter From The Canyon County Chief Deputy Prosecutor To The Ada County Prosecutor Dated August 20, 1999, Notifying Criminal Charges Against Gibson Were Inappropriate..... 259a

APPENDIX 52 – Letter From Sheriff's Legal Advisor, R. Monte MacConnell, Dated August 11, 1999, Acknowledging Gibson's Right And Demand For A Due Process Pre-Termination

Table Of Appendices

Page

Hearing, Acknowledging Awareness Of Gibson's Medical Condition, Acknowledging Salary Paid To Gibson Was In Error, And Advising Gibson Would Receive Salary Owed To Her, Up To the Actual Date Of Termination..... 260a

APPENDIX 53 –Letter From The Ada County Prosecutor Dated August 9, 1999, Granting Authority To The Canyon County Chief Criminal Deputy Prosecutor To File Charges Against Gibson, With The Intent To Have The Canyon County Chief Deputy Prosecutor "Appointed" As Special Prosecutor, In A Fashion Contrary To Idaho Law..... 262a

APPENDIX 54 – Medical Records From Stephen E. Spencer, M.D., Verifying Gibson's Medical Condition Had Not Improved, And She Was Incapable Of Participating In Any Hearing Until Further Notice..... 264a

APPENDIX 55 – Notice Of Intent To Impose Discipline [Termination] On Gibson From Ada County Sheriff Dated August 2, 1999, Containing Misstated Facts, False Charges, Contrary To Any Good Cause To Terminate Employment, And Acknowledging Gibson's Right to a Due Process Pre-Termination Hearing..... 265a

APPENDIX 56 –Communication From Ada County Payroll Department Dated July 19, 1999, To The Budget Director Of the Ada County Sheriff's Office..... 268a

Table Of Appendices

Page

APPENDIX 57 – Memorandum From Sheriff's Legal Advisor, R. Monte MacConnell, Dated December 23, 1997, Confirming Non-Commissioned Deputies Could Not Be Compensated Under FLSA § 207 k, As Those Deputies Were Not "Law Enforcement Personnel", And Employees Could Not Waive Their Protections Under FLSA..... 275a

APPENDIX 1 – OPINION OF THE IDAHO SUPREME COURT, FILED FEBRUARY 9, 2006

IN THE SUPREME COURT
OF THE STATE OF IDAHO

Docket Nos. 29694/30976/31553

2006 Opinion No. 10

Boise, September 2005 Term

Filed: February 9, 2006

Stephen W. Kenyon, Clerk

STACY A. GIBSON[1],

Plaintiff-Appellant,

v.

ADA COUNTY, a political subdivision of Idaho; ADA COUNTY SHERIFF'S OFFICE; VAUGHN KILLEEN, acting individually and in his official capacity under color of State Law as Ada County Sheriff; R. MONTE MACCONNELL, acting individually and in his official capacity under color of State Law as Legal Advisor to the Ada County Sheriff; ARVILLE GLENN, acting individually and in his official capacity under color of State Law as a law enforcement official for Ada County under the Sheriff; SCOTT JOHNSON, acting individually and in his official capacity under color of State Law as a law enforcement official for Ada County under the Sheriff; and DOES I thru X,

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[1] Idaho Supreme Court Docket No. 29694

Appendix 1

Defendants-Respondents.

STACY A. GIBSON[2],

Plaintiff-Appellant,

v.

ADA COUNTY, a political subdivision and governmental agency of the State of Idaho, and the ADA COUNTY SHERIFF'S OFFICE,

Defendants-Respondents.

ADA COUNTY[3],

Plaintiff-Respondent,

v.

STACY A. GIBSON,

Defendant-Appellant.

Appeal from the District Court of the Fourth Judicial District for Ada County. Honorable Ronald J. Wilper, District Judge and Joel D. Horton, District Judge.

The orders of the district court are affirmed.

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[2] Idaho Supreme Court Docket No. 30976

[3] Idaho Supreme Court Docket No. 31553. This listing of parties was absent from Opinion No. 10 released by the Idaho Supreme Court on February 9, 2006.

Appendix 1

Vernon K. Smith, Jr., Boise, for appellant.

Ada County Prosecuting Attorney, Boise, for respondents. Ray J. Chacko argued.

SCHROEDER, Chief Justice

Three separate cases involving Stacy Gibson (Gibson) and Ada County, et al (Ada County) have been consolidated in this appeal.

I.

FACTUAL AND PROCEDURAL BACKGROUND

Gibson was hired as a Records Technician II with the Ada County Sheriff's Department (ACSD) in 1997. She eventually became a tenured employee in this position, terminable only for cause.

Approximately one week prior to receiving a paycheck, Gibson signed a pay voucher stating:

> I STATE THAT THIS CLAIM HAS BEEN EXAMINED BY ME AND NO OTHER HOURS OR MONIES ARE DUE ME FOR OVERTIME....I REALIZE SIGNING THIS CLAIM AUTHORIZES THE COUNTY TO PAY ME THE AMOUNT SHOWN AND THAT A GRIEVANCE MAY BE FILED WITHIN 5 DAYS IF I DISAGREE WITHOUT LOSS OF ANY PAY.

Appendix 1

In May of 1998 Gibson began participation in the ACSD's direct deposit program which authorized ACSD to deposit Gibson's monthly paychecks into her personal checking account and, "if necessary, debit entries and adjustments for any credit entries in error to [her] account. . . ." Thereafter, Gibson's paychecks were directly deposited, but she continued to receive and sign pay vouchers approximately one week prior to each payday.

In the fall of 1998 Gibson was promoted to the position of Jail Technician II, which paid $1,550 per month plus overtime, a $50 per month increase over her former base salary. In the course of changing Gibson's pay rate an error occurred which combined Gibson's base pay as Jail Technician II with that of her former Records Technician II position. From November 1998 through June 1999, Gibson signed pay vouchers authorizing the ACSD to pay her $3,050, plus overtime equaling $100 to $700, per month. The ACSD paid the amounts shown on the pay vouchers, resulting in Gibson being paid for two positions instead of one.

In June or July of 1999 the ACSD discovered it had overpaid Gibson $8,500 over the course of eight months. The ACSD began an internal and criminal investigation into Gibson's actions regarding the overpayment of funds and concluded that she had knowingly signed pay vouchers indicating that her base salary was $3,050 when she knew her base salary was only $1,550. On August 2, 1999, Sheriff Vaughn Killeen (Killeen) sent Gibson a letter expressing his intent to terminate her on the grounds that she: (1) conducted herself in a "manner as to be detrimental to the good order and discipline of the department;" (2) "made a materially misleading statement in an official report;" and (3) "conducted [her]self in such a manner as to reflect unfavorably on th[e]

department and [her]self." The letter stated that the facts giving rise to Gibson's termination were: (1) she knowingly accepted salary overpayments; and (2) she did nothing to correct the overpayments or repay the monies erroneously paid to her. The letter also advised Gibson of her right to appeal.

Gibson appealed. An Ada County personnel hearing officer (hearing officer) heard the matter on January 25 and 26, 2000, and on February 15, 2000, affirmed Killeen's decision to terminate Gibson. Gibson filed a petition for judicial review with the district court pursuant to Ada County Code § 1-7G-3(o). The district court addressed the matter under the standard of review set forth in the Idaho Administrative Procedure Act (IAPA) and I.C. §§ 67-5277, 67-5279, and affirmed the hearing officer's decision. Gibson appealed to this Court which vacated the decision of the district court and dismissed Gibson's claims without prejudice, finding that no statutory authority exists to grant judicial review of a county personnel hearing officer's findings of fact and conclusions of law. *Gibson v. Ada County Sheriff's Dep't*, 139 Idaho 5, 72 P.3d 845 (2003) [hereinafter *Gibson I*]. *Gibson I* noted that were the appeal from the Ada County Board of Commissioners (Board), the Supreme Court would have a right of review, and the appropriate standard would be based on IAPA.

A second action arose on July 19, 2002, when Gibson filed a complaint and demand for jury trial in district court alleging, among other things, civil rights violations on the part of the ACSD under 42 U.S.C. §§ 1981, 1983 and 1985(3). The district court dismissed the complaint, determining that the two-year statute of limitations had run, the complaint did not allege facts supporting a claim of racial discrimination, an essential element of a claim under 42 U.S.C. § 1981, and no notice of a tort claim had been filed which barred such actions

insofar as any of Gibson's claims were for common law tort. Gibson appealed the district court's decision. That appeal is hereinafter referred to as *Gibson II*.

Following this Court's decision in *Gibson I*, Gibson submitted a petition to the Board for a review of the hearing officer's January 2000 decision. The Board denied Gibson's request on the grounds that the Idaho Constitution and Idaho case law suggest the decision to hire and fire deputies is left to the sole discretion of an elected official, which includes county sheriffs. On June 4, 2003, Gibson submitted a petition for hearing to the Board. The members of the Board sent a letter to counsel for Gibson dated July 2, 2003, which stated that the Board was unable to hold the requested hearing. Several motions were filed thereafter, including Gibson's Motion to Remand to Ada County Board of Commissioners for Creation of an Agency Record with an Evidentiary and Due Process Hearing, Pursuant to Idaho Code § 67-5242 and § 67-5249 and Rule 84, I.R.C.P. (Motion to Remand), her Petition for Judicial Review, and her Motion to Reconsider Interlocutory Order Conditionally Denying and Dismissing Petition for Judicial Review, with Leave to Amend the Pleadings to Include a Common Law Remedy.

On June 17, 2004, the district court entered an Order on Renewed Motion for Reconsideration and Final Order Denying Petition for Judicial Review, which denied her Petition for Judicial Review and her Renewed Motion to Reconsider the Interlocutory Order Conditionally Denying the Petition for Judicial Review (Motion to Reconsider). On appeal, Gibson raises issues regarding whether she is entitled to a declaratory judgment, whether the district court erred when denying her requests for judicial review, reconsideration, and a remand of

the case to the Board. This appeal is hereinafter referred to as *Gibson III.*

Ada County filed a suit seeking repayment of $8,528.89 that had been overpaid to Gibson. Several motions were made among the parties, including a motion filed by Ada County for summary judgment. On December 6, 2004, the district court issued its Memorandum Decision and Order that granted Ada County's Motion for Summary Judgment, followed by a Judgment awarding Ada County $8,528.89, which is the basis of the appeal of *Gibson IV.*

All pending issues in the various actions have been consolidated in this appeal.

II.

STANDARD OF REVIEW

In reviewing the district court's order granting the motion to dismiss, the standard of review is the same as that used in summary judgment. *Rim View Trout Co. v. Idaho Dep't of Water Res.*, 119 Idaho 676, 677, 809 P.2d 1155, 1156 (1991). The standard of review on appeal from an order granting summary judgment is the same standard that is used by the district court in ruling on the motion. *Baxter v. Craney*, 135 Idaho 166, 170, 16 P.3d 263, 267 (2000). Summary judgment is appropriate only when the pleadings, depositions, affidavits and admissions on file show that there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. I.R.C.P. 56(c); *McCann v. McCann*, 138 Idaho 228, 232, 61 P.3d 585, 589 (2002).

"This Court has free review over the construction of a statute, *Waters Garbage v. Shoshone County*, 138 Idaho 648, 650, 67 P.3d 1260, 1262 (2003), which includes whether a statute provides for judicial review, and the standard of review to be applied if judicial review is available." *Hayden Lake Fire Protection Dist. v. Alcorn*, 141 Idaho 388, ___, 111 P.3d 73, 85 (2005). "Summary judgment is proper 'if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" *Samuel v. Hepworth, Nungester & Lezamiz*, 134 Idaho 84, 87, 996 P.2d 303, 306 (2000) (internal citations omitted).

III.

GIBSON II

A. ANY TORT BASED CLAIMS WERE PROPERLY DISMISSED FOR FAILURE TO FILE A NOTICE OF CLAIM.

Prior to bringing a suit for tort against a political subdivision or their employee for any act or omission arising out of the scope of employment, a party must file a notice of the claim with the secretary or clerk of the political subdivision. I.C. §§ 6-906, 6-908 (2003). This notice must be filed within 180 days of when the claim arose or reasonably should have been discovered, whichever is later. I.C. §§ 6-906, 6-908; *Cobbley v. City of Challis*, 138 Idaho 154, 157, 59 P.3d 959, 962 (2002); *McQuillan v. City of Ammon*, 113 Idaho 719, 722, 747 P.2d 741, 744 (1987). While Gibson apparently does not believe the complaint alleges tort claims, Counts III, IV, and VI broadly read allege causes of action for intentional

infliction of emotional distress and other related common law tort claims. Gibson did not file a notice of tort claims with ACSD. Gibson does not address these causes of action on appeal. To the extent the complaint alleges tort claims, these claims are barred. The district court properly dismissed such claims.

B. THE CLAIMS BASED ON 42 U.S.C. §§ 1981 AND 1985 WERE PROPERLY DISMISSED.

Gibson's remaining claims allege civil rights violations under Title 42 U.S.C. §§ 1981, 1983 and 1985. As correctly stated by the district court, 42 U.S.C. § 1981 requires an allegation of a race-based classification or discrimination. *Runyon v. McCrary*, 427 U.S. 160, 168, 96 S.Ct. 2586, 2593 (1976); *Pavon v. Swift Transp. Co., Inc.*, 192 F.3d 902, 908 (9th Cir. 1999). Gibson has not alleged any facts suggesting discrimination on the basis of race, class or color. The district court properly dismissed the claims pursuant to § 1981.

The district court dismissed Gibson's § 1985(3) claim on the grounds that it was barred by the statute of limitations. This claim may be also dismissed on the alternative ground of failure to allege a race or class-based discrimination. Title 42 U.S.C. § 1985(3) requires "that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirator's action." *Stevens v. Rifkin*, 608 F.Supp. 710, 719 (D.C. Cal. 1984) (citing *Griffin v. Beckenridge*, 403 U.S. 88, 101-02, 91 S.Ct. 1790, 1798 (1971)). Gibson has failed to allege any facts suggesting conspiracy on the part of ACSD or its employees to discriminate on the basis of race or class. Regardless of the statute of limitations issue, Gibson's § 1985(3) claim was properly dismissed.

C. GIBSON WAS NOT REQUIRED TO EXHAUST ADMINISTRATIVE REMEDIES PRIOR TO FILING HER 42 U.S.C. § 1983 CIVIL RIGHTS CLAIM BUT COULD CHOOSE TO DO SO.

Title 42 U.S.C. § 1983 (2004) provides a cause of action for "anyone who is deprived, by a person acting under color of state law, of rights secured by the United States Constitution or federal law." *Bryant v. City of Blackfoot*, 137 Idaho 307, 314, 48 P.3d 636, 643 (2002). The Fourteenth Amendment protects persons against deprivation of a property or liberty interest without due process of law. U.S. CONST., art. XIV. Public employment is included within the realm of those interests protected under the Fourteenth Amendment. *Bd. of Regents v. Roth*, 408 U.S. 564, 92 S.Ct. 2701 (1972); *Harkness v. City of Burley*, 110 Idaho 353, 355, 715 P.2d 1283, 1285 (1986). In Idaho a permanent or classified employee whose employment is not terminable at will has a due process property interest in continued employment. *Harkness*, 110 Idaho at 356, 715 P.2d at 1286 (citing *Allen v. Lewis-Clark State College*, 105 Idaho 447, 460 n. 6, 670 P.2d 854, 867 n. 6 (1983)). Thus, wrongful termination of a classified employee gives rise to a § 1983 claim for violation of a due process property right in continued state employment.

Civil rights claims arising under 42 U.S.C. § 1983 are governed by federal law. *Henderson v. State*, 110 Idaho 308, 310, 715 P.2d 978, 981 (1986). The U.S. Supreme Court and several federal circuits have held that it is not a prerequisite to filing a § 1983 claim that a party must exhaust all state administrative remedies. *Patsy v. Bd. of Regents of the State of Florida*, 457 U.S. 496, 501, 102 S.Ct. 2557, 2560 (1982); *Ellis v. Dyson*, 421 U.S. 426, 432, 95 S.Ct. 1691, 1695 (1975). However, to the extent an agency's decision must be ripe for

review, administrative remedies may be required. *See Raper v. Lucy*, 488 F.2d 748, 750 n.3 (1st Cir. 1973). *Raper* involved a § 1983 claim for deprivation of due process in the denial of a motor vehicle license. The court found that although exhaustion was not a prerequisite to filing a § 1983 claim "there must be *at least some definitive administrative or institutional determination* before [an] action may arise." *Raper*, 488 F.2d at 751 n.3 (emphasis added). The court found this view consistent with a previous holding that "reference to local institutional authority as may be necessary to assure that the action complained of is final . . . in the sense that is ripe for adjudication" is proper in the school employment context. *Id.* (quoting *Stevenson v. Bd. of Educ.*, 426 F.2d 1154, 1157 (5th Cir.) *cert. den.*, 400 U.S. 957 (1970)). Therefore, to the extent administrative remedies are part of a final agency action, exhaustion may be required.

Idaho Code § 67-5271(1) provides that "[a] person is not entitled to judicial review of an agency action until that person has exhausted all administrative remedies . . . ." I.C. § 67-5271(1) (2003). Notably this portion of IAPA governs judicial review of *state* rather than *local* agency actions. *Idaho Historic Pres. Council, Inc. v. City of Boise City Council*, 134 Idaho 651, 653, 8 P.3d 646, 647 (2000). However, where a local agency action is appealed to a state agency body, IAPA applies to judicial review of that state agency's decision. I.C. § 67-5201 (2003). Ada County Code § 1-7H-1(A) requires that a classified employee utilize the procedures outlined in the Ada County Code for redress of any "difficulty or problem he or she may have with any aspect of his or her employment . . ." A.C.C. § 1-7H-1(A) (2004). Review of an elected official's decision to dismiss a classified employee must be submitted in writing to the Ada County personnel director who then

forwards the request to the Ada County personnel hearing officer for a formal hearing. A.C.C. § 1-7G-3(L) (2000). Ada County Code § 1-7G-3(O) then allows for appeal of a hearing officer's decision to a district court of proper jurisdiction.

Gibson sought judicial review of Ada County's decision to terminate her employment consistent with I.C. § 62-5271(3), A.C.C. §§ 1-7G-3(L), 1-7G-3(O) and 1-7H-1(A). She then elected to file a § 1983 claim in state court rather than in federal court pursuant to Title 28 U.S.C. § 1343 (2004). *Patsy* and the other similarly decided cases hold that Gibson was not required to exhaust her administrative remedies prior to filing suit. However, exhaustion of administrative remedies not being a prerequisite to filing a § 1983 claim is different than a holding that Gibson must file her § 1983 claim and forgo exhaustion of administrative remedies. Furthermore, *Raper* requires that some "definitive administrative decision" be made before a § 1983 claim arises. *Raper*, 488 F.2d at 751 n.3. The question is whether exhaustion of remedies was required to make Gibson's claim ripe for suit under § 1983. Simply stated in this case, was there a "definitive administrative decision" which triggered commencement of the statute of limitations?

Gibson maintains that the statute of limitations on her civil rights claims was tolled while she attempted to exhaust her administrative remedies arguing that: (1) the statute of limitations is tolled until an agency commits a "last act" and in this case the last act was the Board's refusal to grant her petition for review on July 2, 2003, (2) the statute of limitations was and is still tolled due to Ada County's continuing violations of the FLSA, and (3) the statute of limitations was and is still tolled because A.C.C. §§ 1-7G-1

through 1-7G-3 fail to comply with I.C. § 31-714 and constitutional due process provisions.

Ada County argues that the two-year statute of limitations in cases such as Gibson's begins to run on the day the harm is known. *See Delaware State Coll. v. Ricks*, 449 U.S. 250, 258, 101 S.Ct. 498, 504 (1980); *see also Chardon v. Fernandez*, 454 U.S. 6, 7-8, 102 S.Ct. 28, 29 (1981). According to Ada County, the last date on which Gibson bases her claims is February 15, 2000, the date on which she received notice of her termination, and, consequently, she was required to file her claim by February 15, 2002, some five months before the complaint was filed.

State law determines the length of the statute of limitations applicable to Title 42 U.S.C. § 1983 claims. *See Henderson*, 110 Idaho at 310, 715 P.2d at 981. This includes whether any state tolling provisions may apply. *Bd. of Regents v. Tomanio*, 446 U.S. 478, 484, 100 S.Ct. 1790, 1795 (1980). In Idaho there is a two-year statute of limitations on all § 1983 claims similar to personal injury actions. I.C. § 5-219(4) (2004); *Henderson*, 110 Idaho at 311, 715 P.2d at 981.

Although state law governs statute of limitations restrictions on § 1983, federal law governs when accrual of such claims begins. *Id.* According to *Henderson*, "federal law determines the 'last act' for purposes of tolling a state's statute of limitations." *Id.* (quoting *Briley v. California*, 564 F.2d, 849, 855 (9th Cir. 1977)). The generally accepted rule is that accrual begins when a "plaintiff knows or has reason to know of the injury which is the basis of their action." *Id.* (quoting *Cox v. Stanton*, 529 F.2d 47, 50 (4th Cir. 1975)).

Appendix 1

Accrual of the limitations period in the employment context has been most clearly discussed in *Delaware State Coll. v. Ricks*, 449 U.S. 250, 101 S.Ct. 498 (1980), and *Chardon v. Fernandez*, 454 U.S. 6, 102 S.Ct. 28 (1981). In *Delaware* plaintiff, Ricks, filed a § 1983 claim against defendant, Delaware State College, for alleged violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000-e et seq, for denying him tenure. *Delaware*, 449 U.S. at 250, 101 S.Ct. at 500. Although Ricks was orally notified tenure was denied he was offered a one-year terminal contract. Ricks argued it was the termination of this one-year contract rather than notice his tenure was denied that started accrual of his § 1983 claim. *Id.* The United States Supreme Court disagreed, finding, "[p]endency of a grievance or some other method of collateral review of an employment decision does not toll the running of the limitations period." *Id.* at 261, 101 S.Ct. at 506 (citing *Int'l Union of Elec., Radio & Mach. Workers v. Robbins & Myers, Inc.*, 429 U.S. 229, 97 S.Ct. 441 (1976)). It is the *decision constituting the discriminatory act* and not the consequences of that act which triggers the statute of limitations. "The proper focus is upon the time of the *discriminatory acts*, not upon the time at which the *consequences* of the acts became most painful." *Id.* at 257, 258, 101 S.Ct. at 504 (quoting *Abramson v. Univ. of Hawaii*, 594 F.2d 202, 209 (1979). This reasoning was later reiterated in *Chardon*, in which the Supreme Court held that a § 1983 claim accrued on the date a plaintiff received notice of termination of his employment rather than on the date plaintiff was actually terminated. *Chardon*, 454 U.S. at 7-8, 102 S.Ct. at 29. The Second Circuit has furthermore held that accrual of a § 1983 claim "doesn't require judicial verification that a defendant's acts were wrongful." *Halpern*, 52 F.Supp.2d 324, 329 (quoting *Veal v. Geraci*, 23 F.3d 722, 724 (2d Cir. 1994)).

Gibson relies on *Hoesterey v. City of Cathedral City*, 945 F.2d 317 (9th Cir. 1991), which found that a city manager's § 1983 claim could not accrue until the manager could be assured that the discharge decision was final and that it would not be followed by further process. *Hoesterey* distinguished both *Delaware* and *Chardon* on the grounds that these cases involved alleged discrimination in the actual decision to terminate the employee rather than the lack of process alleged as the discriminatory act in *Hoesterey*. *Id.* at 320.

Likewise, in *McCoy v. City & County of San Francisco*, 14 F.3d 28 (9th Cir. 1994), the Ninth Circuit held that accrual of a § 1983 claim challenging a police officer's suspension did not accrue until a final written decision had been given by the Police Commission, despite that an oral decision from the Commission had already been made. *Id.* at 28-30. In *McCoy*, however, the written decision of the Personnel Commission took the form of final decision of the agency. *Id.* at 30. *See also Hill v. Tennessee*, 868 F.Supp. 221, 224 (M.D. Tenn. 1994) (Title 42 U.S.C. § 1983 claim accrued on the date a State Supreme Court denied a plaintiff's request for appeal of a forfeiture rather than on the date the initial forfeiture decision was made). Thus to the extent awaiting the Commission's final written decision constituted final agency action, a discriminatory act had to occur from which McCoy could base a § 1983 cause of action.

Finally, in *Norco Const. v. King County*, 801 F.2d 1143 (9th Cir. 1986), the Ninth Circuit found that a plaintiff whose application for preliminary plat approval had been unreasonably delayed was not injured until the county commission actually rendered its final decision regarding the plat, regardless of whether the plaintiff knew that his lot had been taken without due process of law at an earlier date. *Id.* at

1145. The discriminatory act in *Norco* was the unnecessary delay in acceptance of the plaintiff's application as compared with other applications which had received faster review. Naturally this injury could not be determined until the commission had officially acted.

Gibson argues that she was discriminated against in her actual termination as well as in the interrogation process leading up to her termination. Her complaint does not specifically allege deprivation of due process in the grievance procedures themselves, although this does appear to be part of her argument on appeal. She maintains that the Board's refusal to grant review of the hearing officer's decision constitutes an ongoing deprivation of her due process rights. Notably, the complaint was filed prior to the Board's decision to deny review. However, whether the Board's decision allowed Gibson proper procedural due process is not the issue before this Court. The question is whether there has been a definitive administrative decision or whether accrual for purposes of the statute of limitations awaits a final resolution of the question of whether the Board was required to hear her claim.

Gibson's Complaint is unlike that of *Hoesterey* where the alleged discriminatory act was failure of the employer to grant a pre-termination hearing. Gibson was given a pre-termination hearing by way of the hearing conducted on February 15, 2000. Her Complaint reveals no allegations of discrimination in this review process. Moreover, her notice of termination as well as the Hearing Officer's decision are sufficient to satisfy the ripeness standard articulated in *Raper*, as they constitute a final decision as to the status of Gibson's employment. Thus Gibson's case is similar to that of *Delaware* and *Chardon*. Accrual of her § 1983 claim began on February 15, 2000, with the hearing officer's final decision to terminate.

Finally, Gibson's argument that Ada County's continuing violations of the Fair Labor Standards Act (FLSA) tolled the statute of limitations on her § 1983 claim is without merit for two reasons. Title 29 U.S.C. § 211(c) provides that an employer is required to keep accurate records of wages, hours, conditions and practices of employment. 29 U.S.C. § 211(c) (2004). This provision of the FLSA does not confer a federal right upon an employee to form the basis of a § 1983 claim. *See, e.g., Brock v. Bowen Mfr. Hous., Inc.*, 681 F.Supp. 1224 (W.D. Tex. 1987) (29 U.S.C. § 211(c) requires an employer to keep accurate records). Additionally, Gibson asserts § 1983 claims based on Ada County's alleged violations of 29 U.S.C. §§ 207(k) and 215(a)(3). However, 29 U.S.C. § 216(b) provides a cause of action and damages for violations of such provisions of the FLSA. Where an extensive statutory scheme has already been created to provide relief for a federal right, this Court has held that a party is obligated to use that statutory scheme and not a § 1983 action. *Bryant v. City of Blackfoot,* 137 Idaho 307, 314, 48 P.3d 636, 643 (2002). Thus the statute of limitations was not tolled by any alleged failure to maintain accurate records by Ada County.

Idaho has a two-year statute of limitations on all 42 U.S.C. § 1983 claims. *Henderson*, 110 Idaho at 311, 715 P.2d at 981. Gibson's § 1983 claim began to accrue on February 15, 2000, when the hearing officer made his decision. She filed her § 1983 claim on July 19, 2002, five months past the statute of limitations. Her claim is timebarred. The district court properly dismissed her claim.

D. NEITHER PARTY IS ENTITLED TO ATTORNEY FEES.

Appendix 1

Idaho Code § 12-117 mandates an award of attorney fees to the prevailing party of a civil suit against a state agency "if the court finds that the party against whom the judgment is rendered acted without a reasonable basis in fact or law." I.C. § 12-117(1) (2003). A county is not a state agency within the meaning of this statute. *IHC Hosps. v. Bd. of Comm'rs*, 117 Idaho 207, 212, 786 P.2d 600, 606 (Ct. App. 1990). Where a prevailing party is not subject to I.C. § 12-117 attorney fees may not be awarded. *Horne v. Idaho State Univ.*, 138 Idaho 700, 706, 69 P.3d 120, 126 (2003) (in an employee's termination of employment case university was not entitled to attorney fees under 12-117 because university was not a "state agency" within meaning of the statute). Ada County is not a state agency within the meaning of I.C. § 12-117. More fundamentally, Gibson is not a prevailing party.

Idaho Code § 12-121 allows a court to award reasonable attorney fees to a prevailing party. I.C. § 12-121 (2003). "Party" includes the State of Idaho and its political subdivisions. I.C. § 12-121. Generally attorney fees will be awarded under this section where "an appeal was brought pursued or defended frivolously, unreasonably or without foundation." *Waters Garbage v. Shoshone County*, 138 Idaho 648, 653, 67 P.3d 1260, 1265 (2003). All but one of Gibson's claims were dismissed on alternate grounds not addressed by Gibson on appeal. The § 1983 civil rights claim is time-barred as was found by the district court. Although Gibson is unsuccessful in her appeal, it does not appear that she pursued this appeal frivolously, unreasonably or without foundation. She made a good faith argument based on relevant authority that the statute of limitations was tolled. An award of attorney fees to Ada County under I.C. § 12-121 is not appropriate.

Appendix 1

GIBSON III

A. THE DISTRICT COURT DID NOT ERR WHEN DENYING GIBSON'S PETITION FOR JUDICIAL REVIEW.

Idaho Code § 31-1506 provides that a person is entitled to initiate judicial review of any "act, order or proceeding" of the Board and the merits of the subject matter would be subject to review and the IAPA standard of review would apply. Gibson contends the Board's nonaction regarding her requested hearing constitutes an "act, order or proceeding" and she is entitled to judicial review. She also argues this Court confirmed in *Gibson I* that judicial review under I.C. § 31-1506 became applicable after Gibson went before the Board.

Idaho Rule of Civil Procedure 84 provides guidance regarding judicial review by a district court of agency actions. It provides:

> The procedures and standards of review applicable to juridical review of state agency and local government actions shall be as provided by statute. When judicial review of an action of a state agency or local government is expressly provided by statute but no stated procedure or standard of review is provided in that statute, then Rule 84 provides the procedure for the district Court's judicial review. *Actions of state agencies or officers or actions of a local government, its officers or its units are not subject to judicial review unless expressly authorized by statute*. Rule 84 does not apply to the issuance of writs of mandate, prohibition, quo warranto, certiorari, review, or other common law or equitable writs, but petitions for judicial review

> under this rule may be filed with or in the alternative to petitions for these common law or equitable writs.

I.R.C.P. 84(a)(1) (2005) (emphasis added). This Court has already discussed whether the district court has the authority to review the Sheriff's decision to terminate Gibson's employment. In *Gibson I* this Court held:

> Statutes may also authorize judicial review without invoking the provisions of the IAPA. I.R.C.P. 84(a)(1). The rule, however, states "actions of a local government, [or] its officers . . . are not subject to judicial review unless expressly authorized by statute." I.R.C.P. 84(a)(1). There is no statute authorizing judicial review of a decision by the county personnel hearing officer. Therefore, this matter is not subject to review pursuant to I.R.C.P. 84.

Gibson I, 139 Idaho 5, 8, 72 P.3d 845, 848 (2003). Since that case was released in 2003, Gibson has failed to identify any statute that provides authority allowing the Board to review the personnel decision of an elected County officer. She claims this Court "confirmed" that she is entitled to judicial review under I.C. § 31-1506 after she went before the Board. It appears that she is referring to the Court's following statements: "[H]ad Gibson appealed the county personnel hearing officer's decision to the [board], the board's decision would be an appropriate subject for judicial review and IAPA standard of review would apply. I.C. § 31-1506(1). Without action of the board, however, the judicial review provisions of I.C. § 31-1506(1) are inapplicable." *Id.* This Court's language was not a mandate for the district court to review the sheriff's decision. The Court ruled that I.R.C.P. 84 required a statute exist that provided authority for judicial review. This Court in

no way indicated it could provide an alternate means for the district court to review the officer's decision in this situation. Furthermore, even if this Court attempted to provide such authorization, it would not satisfy I.R.C.P. 84.

Gibson alleges the Board's refusal to review the sheriff's decision to terminate her employment constitutes an "action" as used in I.C. § 31-1506(1). "This Court has free review over the construction of a statute, *Waters Garbage v. Shoshone County*, 138 Idaho 648, 650, 67 P.3d 1260, 1262 (2003), *which includes whether a statute provides for judicial review*, and the standard of review to be applied if judicial review is available." *Hayden Lake Fire Protection Dist. v. Alcorn*, 141 Idaho 388, ___, 111 P.3d 73, 85 (2005) (emphasis added). Idaho Rule of Civil Procedure 84 clearly states that a statute must "expressly" authorize that an action of an officer is subject to judicial review. Idaho Code § 31-1506(1) does not satisfy I.R.C.P. 84 because it does not specifically authorize judicial review in this instance.

Finally, Gibson cites A.C.C. § 1-14-1 through § 1-14-8 as support for her position. This Court plainly stated that "A County Ordinance Cannot Authorize Judicial Review," in a title heading in *Gibson I.*

This Court affirms the district court's decision to deny Gibson's Petition for Judicial Review and adopt its findings that: "Pursuant to Rule 84, I.R.C.P., a petition for judicial review will only lie if permitted by statute. There exists no statute or constitutional authority under Idaho law allowing a Board of County Commissions to review the personnel decision of other elected County officers."

B. THE DISTRICT COURT DID NOT ERR WHEN DENYING GIBSON'S MOTION TO REMAND.

Gibson argues the district court erred when denying her motion to remand the case to the Board. She alleges she has been deprived of her right to due process because of the Board's failure to make findings of fact. However, if judicial review is not proper, an argument that the Board needed to make findings of fact is nonsensical. If I.R.C.P. 84 does not authorize the Board to review decisions of other elected officials, it would be ineffective for the district court or this Court to find that Gibson's motion to remand should be granted to make findings of fact. The district court correctly denied Gibson's motion to remand.

C. GIBSON IS NOT ENTITLED TO A DECLARATORY JUDGMENT.

Gibson requests this Court to issue a declaratory judgment against Ada County proclaiming A.C.C. § 1-7G-3 (O) and various provisions of the merit system, A.C.C. § 1-7-1 through § 1-7L-10, unconstitutional, repugnant in law, contrary to procedural due process requirement, and entitle appellant to employment reinstatement with rank, seniority, benefits, privileges, and back pay. She contends this Court has original jurisdiction to issue such a declaratory judgment pursuant to I.C. § 10-1202, which states:

> Any person interested under a deed, will, written contract or other writings constituting a contract or any oral contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the

> instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder.

It appears Gibson has ignored another Idaho Code section that clarifies how one properly requests a declaratory judgment. Idaho Code § 67-5272(1) states: "Except when required by other provision of law, proceedings for review or declaratory judgment are instituted by filing a petition in the district court." Additionally, Article V, section 9, of the Idaho Constitution sets forth situations in which this Court has original jurisdiction. Under the Idaho Constitution, this Court has original jurisdiction "to issue writs of mandamus, certiorari, prohibition, and habeas corpus, and all writs necessary or proper to the complete exercise of its appellate jurisdiction." Noticeably, issuing declaratory judgments is not included. Gibson's request is outside the scope of this appeal and, therefore, this Court declines to review it.

D. ADA COUNTY IS ENTITLED TO ATTORNEY FEES ON APPEAL.

An award of attorney fees pursuant to I.C. § 12-121 is appropriate "when this Court has the abiding belief that the appeal was brought or defended frivolously, unreasonably or without foundation." *Risk v. Royal Caribbean Cruises, Ltd.*, 141 Idaho 290, ___, 108 P.3d 990, 995 (2005) (citing *Lovelass v. Sword,* 140 Idaho 105, 109, 90 P.3d 330, 334 (2004). Gibson argues on appeal that the district court erred when denying her request for judicial review. However, after repeated direction from the district court and guidance from this Court regarding this particular case, she still has not cited a statute that authorizes the Board to review the personnel decision of other elected County officers as required by I.R.C.P. 84. She also

appealed the district court's denial of her Motion to Remand. As previously discussed, it is illogical to argue her Motion to Remand should be granted if she cannot provide authority upon which a court could grant her Petition for Review. Finally, Gibson requests this Court to issue a declaratory judgment against Ada County proclaiming A.C.C. § 1-7G-3 (O) and various provisions of the merit system unconstitutional, repugnant in law, contrary to procedural due process requirement, and entitling her to employment reinstatement with rank, seniority, benefits, privileges, and back pay. She attempts to have this Court accept her statement that I.C. § 10-1202 provides this Court with original jurisdiction to issue such a declaratory judgment as true, when such a contention is not even debatable. This Court finds Gibson brought this appeal frivolously, unreasonably or without foundation and awards attorney fees to Ada County.

GIBSON IV

A. THE DISTRICT COURT DID NOT ERR WHEN GRANTING ADA COUNTY'S MOTION FOR SUMMARY JUDGMENT.

The district court issued a Memorandum Decision and Order that granted Ada County's motion for summary judgment, followed by a Judgment awarding Ada County $8,528.89. The proper standard of review is as follows:

> When this Court reviews a district court's grant of summary judgment, it uses the same standard properly employed by the district court originally ruling on the motion. Summary judgment is proper "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as

> to any material fact and that the moving party is entitled to a judgment as a matter of law." This Court construes the record in the light most favorable to the non-moving party, and draws all reasonable inferences in favor of that party. If reasonable minds might come to different conclusions, summary judgment is inappropriate. "[A] mere scintilla of evidence or only slight doubt as to the facts" is not sufficient to create a genuine issue for purposes of summary judgment. The non-moving party "must respond to the summary judgment motion with specific facts showing there is a genuine issue for trial."

Samuel v. Hepworth, Nungester & Lezamiz, 134 Idaho 84, 87, 996 P.2d 303, 306 (2000) (internal citations omitted). Additional guidance is provided by I.R.C.P. 56(e), which states in part:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of that party's pleadings, but the party's response, by affidavits or as otherwise provided in this rule, must set forth *specific facts showing that there is a genuine issue for trial*. If the party does not respond, summary judgment, if appropriate shall be entered against the party.

(Emphasis added).

When granting Ada County's Motion for Summary Judgment, the judge ruled that Gibson was unjustly enriched, the elements of which are: "(1) a benefit is conferred upon defendant by plaintiff, (2) appreciation by the defendant of the benefit, and (3) acceptance of the benefit under circumstances

that would be inequitable for the defendant to retain the benefit without payment of the value thereof." *Aberdeen-Springfield Canal Co. v. Peiper*, 133 Idaho 82, 88, 982 P.2d 917, 923 (1999). The district court found Gibson was receiving two salaries, that she did appreciate and accept the benefit of the overpayments, and it is inequitable for Gibson to retain the overpayments. The district court noted that Gibson argued there is a discrepancy in the amount of overpayment, as she does on appeal. The district court disagreed with Gibson, noting she "failed to provide any accounting of her own" and that Kelli Bolicek, the Finance Manager of the County Sheriff's Office, and Cheryl Bower, the Controller at the County Clerk/Auditor/Recorder's Office, were competent to provide information regarding the amount of overpayment.

Gibson claims the district court erred when it ruled that she "failed to provide any accounting of her own." She claims she provided a detailed accounting in her Second Amended Counterclaim. A review of the 55-page amended counterclaim reveals that she did not provide an accounting of her own. Though she previously acknowledges she was overpaid, she fails to set forth an exact amount of what she believes was overpaid. While she includes a chart that shows wages due, the numbers indicate they are estimations. Another chart indicates the number of overtime hours she claims to have worked, though it does not contain the amount of payment owed for the hours she claims to have worked. As stated by this Court, a "mere scintilla of evidence" is not sufficient to preclude summary judgment. *Samuel*, 134 Idaho at 87, 996 P.2d at 306. Specific facts are necessary to show there is a genuine issue of material fact and this Court affirms the district court's ruling that Gibson has failed to meet this standard.

Gibson makes the additional argument that the district court decision should be reversed because it failed to set forth findings of fact. Idaho Rule of Civil Procedure 52(a) states that, "[f]indings of fact and conclusions of law are unnecessary . . . on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b) . . . ." The district court's decision and order were concerning Ada County's Motion for Summary Judgment. Idaho Rule of Civil Procedure 56 discusses Summary Judgment motions for claimants; therefore under I.R.C.P. 52(a), findings of fact are unnecessary and Gibson's argument fails.

B. GIBSON IS NOT ENTITLED TO RELIEF UNDER THE FLSA.

Gibson argues the district court erred when not allowing her to pursue claims for offset, credit or relief under the FLSA, when it granted summary judgment in favor of Ada County. This appeal concerns the decision of the district court's Memorandum Decision and Order Granting Plaintiff's Motion for Summary Judgment, filed in December 2004. That decision did not deal directly with Gibson's claim that she is entitled to relief under the FLSA for alleged violations of the Act. In fact, the district court granted Ada County's motion to dismiss Gibson's Second Amended Complaint in which she alleges she is entitled to relief under the FLSA. The district court stated in its order dated September 16, 2004:

> The Court has already ruled that Gibson cannot bring these claims. Even Gibson acknowledges that at a hearing on January 23, 2001, the Court stated: "The Court will not allow the defendant, or rather Ms. Gibson, to amend her complaint to allege a violation of the Fair Labor Standards Act based on the facts of this

> controversy, based on the Court's previous ruling that the Fair Labor Standards Act does not apply."

Gibson brings her FLSA argument on appeal by alleging she is entitled to a reduction in the amount granted under summary judgment due to Ada County's alleged violations of the Act. Gibson argues she is entitled to relief under 29 § U.S.C. 215 (a)(3), which states:

> [I]t shall be unlawful for any person . . . to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee.

Gibson contends, "The effect of the County's overpayments was the sole basis used to terminate Gibson, as the County chose to shift their fault to Gibson for the erroneous wage and record-keeping processes used by Ada County and its Payroll Department." Gibson cites *Walling v. De Soto Creamery & Produce Co.*, 51 F.Supp. 938, 943 (D.C. Minn. 1943), which held:

> By failing to keep true records of the hours worked each work day and each workweek by each of its employees, and by making or causing to be made arbitrary, fictitious and false entries, purporting to reflect the hours worked each day and each workweek by each of its employees, the regular rate of pay, the regular straight time earnings, and the additional overtime earnings of many of its employees as above stated, the defendant has violated the . . . Act.

However, an overpayment of wages is not a violation of the FLSA. Gibson cites *Walling* to support her position that she is entitled to relief under the FLSA; however, that case does not support the contention that overpayment is a violation of the Act. In that case, the employer failed to keep true work records and pay overtime by using fictitious and false entries. *Walling* does not stand for the proposition that overpayment by an employer is a record-keeping violation that is actionable under the Act.

Ada County has always maintained that the overpayment was a result of a mistake on its part. It is uncertain why Gibson cites cases dealing with an employer's failure to keep records reflecting the hours worked by employees to support her position. The actions that led to her termination were her conduct in keeping the overpayments, which have yet to be returned to Ada County, and for failing to report the overpayments. This analysis precludes the necessity of addressing Ada County's additional arguments concerning why relief under the FLSA is inappropriate here.

This Court holds the district court's decision to not reduce the amount of relief due to Ada County for alleged violations of the FLSA was proper.

C. ADA COUNTY IS ENTITLED TO ATTORNEY FEES ON APPEAL.

An award of attorney fees pursuant to I.C. § 12-121 is appropriate when an appeal is brought or defended "frivolously, unreasonably or without foundation." *Risk v. Royal Caribean Cruises, Ltd.*, 141 Idaho 290, ___, 108 P.3d 990, 995 (2005) (citing *Lovelass v. Sword*, 140 Idaho 105, 109, 90 P.3d 330, 334 (2004). Gibson fails to properly address the

substance of the district court's memorandum decision and order granting Ada County's Motion for Summary Judgment. She again argues she is entitled to a reduction in the amount owed to Ada because of alleged violations of the FLSA; however the district court dismissed her amended complaint in which she alleged FLSA violations. She attempted to get around that dismissal by contending she is entitled to a reduction in the amount owed to Ada County under summary judgment. She relies on the same arguments she made at the district court level. When an appellant does not identify a finding of fact that is not supported by substantial and competent evidence, and the appellate court is simply asked to second-guess factual determinations and is not asked to establish new legal standards, nor modify or clarify existing standards, the appeal has been brought frivolously, unreasonably and without foundation. *Fairchild v. Fairchild*, 106 Idaho 147, 152, 676 P.2d 722, 727 (Ct. App. 1984). Here, Gibson fails to properly address the basis upon which the district court made its decision to grant summary judgment. She then asks this Court only to second-guess the district court's findings regarding reduction in the amount she owes Ada County. Attorney fees are awarded to Ada County.

IV.

CONCLUSION

Regarding *Gibson II*, dismissal of the 42 U.S.C. §§ 1981 and 1985(3) civil rights claims can be affirmed on other grounds not at issue on appeal; Gibson was not required to exhaust her administrative remedies; accrual of Gibson's 42 U.S.C. § 1983 claim occurred on February 15, 2000, following the hearing officer's decision; the district court did not err in finding the two-year statute of limitations had run on Gibson's

42 U.S.C. § 1983 civil rights claim; and Ada County is not entitled to an award of attorney fees on appea'

This Court affirms the district court's decisions to deny Gibson's Petition for Judicial Review and Motion to Remand and finds Gibson's request for a declaratory judgment is misplaced in *Gibson III*. Attorney fees are awarded to Ada County.

This Court affirms the district court's decision to grant summary judgment in favor of Ada County and awards attorney fees incurred on appeal to Ada County in *Gibson IV*.

Justices TROUT, EISMANN, BURDICK and JONES **CONCUR**.

APPENDIX 2 – ORDER OF THE IDAHO SUPREME COURT DENYING PETITION FOR REHEARING, FILED MAY 9, 2006

IN THE SUPREME COURT
OF THE STATE OF IDAHO

ORDER DENYING PETITION FOR REHEARING

No. 29694/30976/31553
Ref. No. 06RH-5

Filed: May 9, 2006

STACY A. GIBSON,

Plaintiff-Appellant,

v.

ADA COUNTY, a political subdivision of Idaho; ADA COUNTY SHERIFF'S OFFICE; VAUGHN KILLEEN, acting individually and in his official capacity under color of State Law as Ada County Sheriff; R. MONTE MACCONNELL, acting individually and in his official capacity under color of State Law as Legal Advisor to the Ada County Sheriff; ARVILLE GLENN, acting individually and in his official capacity under color of State Law as a law enforcement official for Ada County under the Sheriff; SCOTT JOHNSON, acting individually and in his official capacity under color of State Law as a law enforcement official for Ada County under the Sheriff; and DOES I thru X,

Defendants-Respondents.

The Appellant having filed a PETITION FOR REHEARING on March 2, 2006, and MEMORANDUM IN

Appendix 2

SUPPORT with attachments on April 26, 2006, of the Court's Opinion released February 9, 2006. The Court being fully advised; therefore, after due consideration,

IT IS HEREBY ORDERED that Appellant's PETITION FOR REHEARING be, and hereby is DENIED.

DATED this 9th day of May, 2006

For the Supreme Court

s/ Stephen Kenyon
Stephen Kenyon, Clerk

cc: Counsel of Record
West Publishing
Lexis/Nexis
Goller Publishing

APPENDIX 3 – ORDER OF THE IDAHO SUPREME COURT DENYING PETITION FOR WRIT OF CERTIORARI, FILED APRIL 25, 2006

IN THE SUPREME COURT
OF THE STATE OF IDAHO

ORDER DENYING PETITION
FOR WRIT OF CERTIORARI

No. 29694/30976/31553
Ref. No. 03S-338

Filed: April 25, 2006

STACY A. GIBSON,

Plaintiff-Appellant,

v.

ADA COUNTY, a political subdivision of Idaho; ADA COUNTY SHERIFF'S OFFICE; VAUGHN KILLEEN, acting individually and in his official capacity under color of State Law as Ada County Sheriff; R. MONTE MACCONNELL, acting individually and in his official capacity under color of State Law as Legal Advisor to the Ada County Sheriff; ARVILLE GLENN, acting individually and in his official capacity under color of State Law as a law enforcement official for Ada County under the Sheriff; SCOTT JOHNSON, acting individually and in his official capacity under color of State Law as a law enforcement official for Ada County under the Sheriff; and DOES I thru X,

Defendants-Respondents.

A PETITION FOR WRIT OF CERTIORARI and supporting MEMORANDUM were filed by counsel for

Appendix 3

Appellant March 22, 2006. The Court is fully advised; therefore, after due consideration,

IT IS HEREBY ORDERED that the PETITION FOR WRIT OF CERTIORARI be, and hereby is, DENIED.

DATED this 9th day of May, 2006

For the Supreme Court

s/ Stephen Kenyon
Stephen Kenyon, Clerk

cc: Counsel of Record
District Judge

APPENDIX 4 – MEMORANDUM IN SUPPORT OF VERIFIED PETITION FOR WRIT OF CERTIORARI, FILED MARCH 22, 2006

IN THE SUPREME COURT
OF THE STATE OF IDAHO

MEMORANDUM IN SUPPORT OF VERIFIED PETITION FOR WRIT OF CERTIORARI

Supreme Court Docket Nos. 29694, 30976 and 31553

Filed: March 22, 2006

STACY A. GIBSON,

Plaintiff-Appellant-Petitioner,

v.

ADA COUNTY, a political subdivision of Idaho; ADA COUNTY SHERIFF'S OFFICE; VAUGHN KILLEEN, acting individually and in his official capacity under color of State Law as Ada County Sheriff; R. MONTE MACCONNELL, acting individually and in his official capacity under color of State Law as Legal Advisor to the Ada County Sheriff; ARVILLE GLENN, acting individually and in his official capacity under color of State Law as a law enforcement official for Ada County under the Sheriff; SCOTT JOHNSON, acting individually and in his official capacity under color of State Law as a law enforcement official for Ada County under the Sheriff; and DOES I thru X,

Defendants-Respondents.

STACY A. GIBSON,

Petitioner-Appellant-Petitioner,

Appendix 4

v.

ADA COUNTY, a political subdivision and governmental agency of the State of Idaho, and the ADA COUNTY SHERIFF'S OFFICE,

Respondents.

I. INTRODUCTION

The Plaintiff-Petitioner-Appellant, Stacy A. Gibson [hereinafter Gibson], through counsel, Vernon K. Smith, and pursuant to Rules 3, 5 and 43, I.A.R., and § 7-201 *et seq.*, Idaho Code, has requested this Court grant Gibson's Petition for Writ of Certiorari and undertake to review the actions and conduct of Ada County, an inferior political subdivision and governmental agency of the State of Idaho, acting through its Board of Ada County Commissioners, Sheriff, Sheriff's Legal Advisor and Personnel Hearing Officer, who have acted in excess of their jurisdiction, or in the absence of constitutional judicial power[4] and authority, and for the Court to review records of the lower district courts and each of Gibson's four appeals (Docket Nos. 27605, 29694, 30976 and 31553), to determine, pursuant to applicable law:

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[4] In § 1-7B-1, Ada County Code, Ada County Personnel System, the Sheriff is defined as an elected official who has "administrative functions" only when hearing disciplinary appeals. Nowhere is it stated in the Ada County Personnel System that an elected official is vested or conferred with any constitutional judicial power or authority to finalize the termination of a classified County employee.

Appendix 4

1. Whether Ada County (Payroll Department and Sheriff's Office) was non-compliant with the mandatory provisions of the *Fair Labor Standards Act* (FLSA), § 211 (c), and exceeded or acted contrary to their jurisdiction, or acted in the absence of constitutional judicial power and authority, when they ignored and failed to keep and maintain proper and accurate wage and payroll records for Gibson;

2. Whether the Ada County Sheriff, Vaughn Killeen [hereinafter Sheriff), was non-complaint with FLSA and Federal law, and exceeded his jurisdiction, or acted in the absence of constitutional judicial power and authority, when he transferred the County's mandatory FLSA record-keeping obligations to Gibson;

3. Whether the Sheriff exceeded his jurisdiction, or acted in the absence of constitutional judicial power and authority, when he manufactured the claim of good cause to terminate Gibson's classified employment with the Sheriff's Office, when such good cause basis declared by the Sheriff and identified in the Ada County Personnel Manual, § 1-7G-3, Ada County Code (hereafter A.C.C.) do no comply with Idaho law under the void-for vagueness doctrine;

4. Whether the Sheriff exceeded his jurisdiction, or acted in the absence of constitutional judicial power and authority, when he declared Gibson's signature on incorrect pay vouchers created by the County Payroll Department, constituted a good cause basis to terminate Gibson's classified employment from the Ada County Sheriff's Office, when such good cause basis declared by the Sheriff and identified in the Ada County Personnel Manual, § 1-7G-3, A.C.C., do not comply with Idaho law under the void-for vagueness doctrine;

5. Whether the Sheriff exceeded his jurisdiction, or acted in the absence of constitutional judicial power and authority, when he declared Gibson's mistaken receipt of monies erroneously deposited by Ada County into the joint check account through the County's Direct Deposit Program, constituted good cause basis to terminate Gibson's classified employment from the Ada County Sheriff's Office, when such good cause basis declared by the Sheriff and identified in the Ada County Personnel Manual, § 1-7G-3, A.C.C., do not comply with Idaho law under the void-for vagueness doctrine, and was and caused solely from the County's incompetent system and inability to keep and maintain accurate payroll records required by the provisions of FLSA, § 211 (c);

6. Whether the Sheriff exceeded his jurisdiction, or acted in the absence of constitutional judicial power and authority, when he declared Gibson violated provisions of the Ada County Sheriff's Office Policy Manual, and constituted good cause basis to terminate Gibson's classified employment from the Ada County Sheriff's Office, when such good cause basis declared by the Sheriff and identified in the Ada County Personnel Manual, § 1-7G-3, A.C.C., do not comply with Idaho law under the void-for vagueness doctrine;

7. Whether the Sheriff exceeded his jurisdiction, or acted in the absence of constitutional judicial power and authority, when he refused to allow Gibson the opportunity of equal protection through the provisions of § 1-7C-6(B), A.C.C., and allow a reduction in her wages to address repayment to Ada County for any erroneous overpayments made by direct deposit to the joint checking account resulting from the County's failure to comply with FLSA record-keeping mandates, and where such conduct by the Sheriff is a substantial and material

breach of the covenants of good faith and fair dealing, under Idaho law;

8. Whether Ada County (through its Sheriff, Payroll Department, Human Resource Department or other Department), exceeded their jurisdiction, or acted in the absence of constitutional judicial power and authority, to deprive Gibson of her right and opportunity to engage in a *Loudermill* pre-termination hearing prior to providing Gibson official notification of intent to terminate, as identified in Gibson's "Notice of Personnel Action" on July 23, 1999 which stated: "Notice of Intent to Terminate";

9. Whether the Sheriff exceeded his jurisdiction, or acted in the absence of constitutional judicial power and authority, when he did on July 28, 1999, sign a directive with his affirmative intent to initiate termination proceedings against Gibson, prior to providing Gibson with any official notification of her right and opportunity to engage in a *Loudermill* pre-termination hearing;

10. Whether the Sheriff's Legal Advisor, R. Monte MacConnell, exceeded his jurisdiction, or acted in the absence of constitutional judicial power and authority, when he did make an extortious threat against Gibson on July 28, 1999, to the effect that if Gibson did not voluntarily resign her employment with the Sheriff's Office, she would be prosecuted for felony grand theft, all of which was done prior to providing Gibson with any official notification of her right and opportunity to engage in a *Loudermill* pre-termination hearing;

11. Whether the Sheriff exceeded his jurisdiction, or acted in the absence of constitutional judicial power and authority,

when he disregarded Gibson's constitutional right to procedural due process and a meaningful opportunity to participate in a pre-termination hearing as required by the U.S. Supreme Court in *Loudermill*, before he terminated her on December 27, 1999, of her;

12. Whether the Sheriff exceeded his jurisdiction, or acted in the absence of constitutional judicial power and authority, when he breached § 1-7G-3 F, A.C.C. of Gibson's employment contract with Ada County, and placed her on administrative leave, without pay, on August 25, 1999, when the established policy and rules of the Ada County Personnel System required the Sheriff to place Gibson on administrative leave, with pay, only, until such time Gibson had appealed the decision of the Sheriff (January 4, 2000), and, after the Sheriff had issued any written decision (December 27, 1999) concerning the disciplinary action he was imposing upon Gibson;

13. Whether the Ada County Personnel Hearing Officer, G. Lance Salladay, acting and compensated through his two year appointment by the Ada County Board of Commissioners, exceeded his jurisdiction, or acted in the absence of constitutional judicial power and authority, when he denied Gibson access to the requested information and exculpatory evidence concerning those matters affecting her FLSA wages, compensation, benefits, and the County FLSA record-keeping violations, which had caused the direct deposit overpayments into Gibson's joint checking account, when Gibson was entitled to such evidence in her defense against the charges made against her by the Sheriff during the non-agency hearing held on January 25th and January 26th, 2000;

14. Whether the 4th District Court Judge, Honorable Ronald Wilper, failed to exercise his judicial authority, or acted in the

absence of proper exercise of his constitutional judicial power and authority, when he denied Gibson her vested statutory right under FLSA to engage Ada County Defendants with a "right of action" for the purpose of vindicating legal and equitable relief under FLSA, for wages Ada County owes her under the provisions of her employment contract;

15. Whether the 4th District Court Judge, Honorable Ronald Wilper, failed to exercise his judicial authority, or acted in the absence of proper exercise of his constitutional judicial power and authority, when he denied Gibson her vested statutory right under Title 42, § 1983, to employ equitable tolling and allow Gibson to engage Ada County Defendants with a "right of action" for the purpose of vindicating legal and equitable relief under Title 42;

16. Whether the 4th District Court Judge, Honorable D. Duff McKee, failed to exercise his judicial authority, or acted in the absence of proper exercise of his constitutional judicial power and authority, when he denied Gibson any access to judicial review of the County's claim the termination of Gibson by an elected official was final[5], and not considering

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[5] On March 21, 2006, the Board of Ada County Commissioners held a public hearing to take under advisement its intent to enact Ordinance No. 612, which will alter, modify, and amend § 1-7G-3 of the Ada County Personnel System, and as a consequence thereof, permanently deprive and dispossess all classified Ada County employees of their constitutional right to participate in an administrative agency review hearing, the right to a definitive and final order from the administrative agency, and the right to access the courts for judicial review of their property rights and interests of their tenured employment status. The County has designed Ordinance No. 612 in such a manner as to reduce due process protection of County employees, and allows the disciplinary and termination decisions of an elected County official to become final, without allowing classified employee the right of administrative agency review, the right to a final and

the sufficiency of Gibson's pleadings (Petition for Judicial Review, dated July 30, 2003), to be sufficient to constitute a Petition for Writ of Review (Certiorari), to review the record of Gibson's termination, and the County's denial of Gibson's constitutional right to due process, including the right to an administrative agency review hearing, the right to a final and definitive administrative agency order, and the right to access the courts for judicial review;

17. Whether the acts undertaken by the Ada County Commissioners, the Ada County Personnel Hearing Officer, the Ada County Sheriff, and the Sheriff's Legal Advisor, exceeded their jurisdiction, or acted in the absence of constitutional judicial power and authority, when these acts caused Gibson to be deprived of a vested property right in her employment, without ever being provided constitutional procedural due process, as required by Federal law; and,

18. Whether the acts undertaken by the Ada County Commissioners, the Ada County Personnel Hearing Officer, the Ada County Sheriff, and the Sheriff's Legal Advisor, exceeded their jurisdiction, or acted in the absence of constitutional judicial power and authority, when they denied Gibson her the right of constitutional due process, contrary to well established Federal and Idaho merit system law as was declared in Hansen v. White, 114 Idaho 907, 762 P.2d 820 (1988) and Hansen v. White, 947 F.2d 1378 (9th Cir. 1991).

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definitive administrative agency ord[illegible] and the right to access a court for judicial review of the discipline or [illegible]mination imposed. See Exhibit 2, attached hereto. This conduct will serve to invite future litigation.

Appendix 4

II. SUMMARIZED STATEMENTS OF FACTS AND ISSUES

For Summarized Statement of Facts and Issues concerning Supreme Court Docket Nos. 27605, 29694, 30976 and 31553, see pages 4-17 of Gibson's Memorandum in Support of her Petition for Rehearing, submitted contemporaneously herewith.

III. ARGUMENT

In the matter of IWP v. State Bd. of Land Comrs., 133 Idaho 55, 982 P.2d 358 (1999), this Idaho Supreme Court stated:

> "This Court has original jurisdiction, pursuant to Article 5, § 9 of the Idaho Constitution, "to issue writs of mandamus, certiorari, prohibition, and habeas corpus, and all writs necessary or proper to the complete exercise of its appellate jurisdiction." Idaho Const. art. V, § 9. We will exercise jurisdiction to review a petition for extraordinary relief where the petition alleges sufficient facts concerning a possible constitutional violation of an urgent nature. *See Nez Perce Tribe v. Cenarrusa*, 125 Idaho 37, 38, 867 P.2d 911, 912 (1993) (citing *Sweeney v. Otter*, 119 Idaho 135, 138, 804 P.2d 308, 311 (1990)); *see also Balderston v. Brady*, 17 Idaho 567, 107 P. 493 (1910). (Emphasis added).

That in accordance with Idaho State law, a writ of review is defined as, "[a] general form of process issuing from an appellate court to bring up for review the record of the proceedings in the court below; the common-law writ of certiorari." BLACK'S LAW DICTIONARY 1605 (7th ed.

Appendix 4

1999. "A writ of review may be granted . . . when an inferior tribunal, board or officer exercising judicial functions, has exceeded the jurisdiction of such tribunal, board or officer, and there is not appeal, nor, in the judgment of the court, any plain, speedy and adequate remedy", as addressed in Union Pac. Land Res. V. Shoshone Assessor, 140 Idaho 528, 532, 96 P.3d 629 (2004).

That a writ of review cannot be extended further than to determine whether an inferior tribunal, board or officer has pursued its authority or has exceeded its jurisdiction, and it is equally well-established that the question of jurisdiction is to be determined by the terms of the statute, and that the question of constitutionality of the statute cannot be reviewed on certiorari, as identified in Weiser National Bank v. Washington County, 30 Idaho 332, 164 P 1014 (1917); see also § 7-202, Idaho Code.

Gibson's Verified Petition for Certiorari is commensurate with two recent decisions of the Federal District Courts, and bear striking resemblance to the issues as exist here, where Gibson has been denied any right to judicial review of her employment termination. See McNulty v. Sandoval County, No. CIV 05-221 BB/ACT, United States District Court, D. New Mexico, August 15, 2005, and in Terlecky v. City of Ruidoso Downs, No. CIV 04-1121 BB DJS, United States District Court, D. New Mexico, January 24, 2006, where the state statutes did allow a governmental agency's employee the right of direct appeal to the district court. That Federal Court stated:

> "Plaintiff had a remedy available in district court, by way of writ of certiorari, even if there is no statutory authorization for the direct

> appeal allowed by the City's personnel manual"; and,
>
> "The personnel manual allows an appeal to state district court from decisions of the City Council, although there does not appear to be statutory authorization for such an appeal in the applicable New Mexico statutes"; and,
>
> "It is true that Plaintiff had a remedy available in district court, by way of writ of certiorari, even if there is no statutory authorization for the direct appeal allowed by the City's personnel manual. *See Zamora v. Village of Ruidoso Down*, 907 P.2d 182, 184 (N.M. 1995) (unless otherwise provided by statute, correct procedure to appeal from administrative employment decision is to petition district court for writ of certiorari)". (Emphasis added).

The District Judge who presided over the *Terlecky* case, the Honorable Bruce Black, exercised his judicial authority and power to promote the interest of justice, and upon his own motion, declared plaintiff's lawsuit pleadings sufficient enough to construe them as a petition for writ of certiorari, thereby causing the failure of any argument made by the defendants that plaintiff had not exercised a right to judicial review. See also Zamora v. Ruidoso Downs, 120 N.M. 778, 907 P.2d 182 (1995), where the New Mexico Supreme Court stated:

> "Unless otherwise provided by statute, the correct procedure to appeal a personnel board's administrative decision is to petition the district court for a writ of certiorari".

Appendix 4

Of interest, if state courts, when asked, refuse to make available an adequate remedy for this type of procedural due process deprivation, a Federal court will then determine whether the 14th Amendment Due Process Clause requires such a remedy, and if it does, the Federal court will remedy the violation. See Hicks v. Jackson County Commission, Civil Action No. CV-03-S-2858-NE, United States District Court, N.D. Alabama, Northeastern Division, June 23, 2005; McKinney v. Pate, 20 F.3d 1550 (11th Cir. 1994).

In Moreland v. Miami-Dade County, 255 F. Supp.2d 1304 (2002), the Federal court stated:

> "In *McKinney v. Pate*, the Eleventh Circuit reiterated that "a procedural due process violation is not complete `unless and until the [s]tate fails to provide due process.'" *McKinney v.Pate*, 20 F.3d 1550, 1557 (11th Cir. 1994) (quoting *Zinermon v.Burch*, 494 U.S. 113, 126, 110 S.Ct. 975, 108 L.Ed.2d 100 (1990)). "[O]nly when the state refuses to provide a process sufficient to remedy the procedural deprivation does a constitutional violation actionable under section 1983 arise." *Id*".

See also Horton v. Bd. Cnty. Com'rs, Flager Cnty, 202 F.3d 1297 (11th Cir. 2000).

Up to this point in time, Ada County and the Idaho state courts have not provided Gibson with an adequate remedy for the deprivation of her property rights under the Due Process Clause of the 14th Amendment. Faced with an inferior governmental administrative agency, acting under color of state law that has deprived Gibson of the procedural guarantee

protected by the 14th Amendment, and the lack of an adequate state remedy, the Federal court would have jurisdiction and authority to proceed with the adjudication of Federal due process claims. See Horton v. Bd. Cnty. Com'rs, Flager Cnty, *supra.*

IV. CONCLUSION

Gibson requests this Court provide her the relief as prayed for in her Verified Petition for Certiorari.

Respectfully Submitted This 22nd day of March 2006.

s/ *Vernon K. Smith*
Vernon K. Smith
Attorney for Plaintiff-Appellant-Petitioner

APPENDIX 5 – VERIFIED PETITION FOR WRIT OF CERTIORARI, FILED MARCH 22, 2006

IN THE SUPREME COURT
OF THE STATE OF IDAHO

VERIFIED PETITION FOR WRIT OF CERTIORARI

Supreme Court Docket Nos. 29694, 30976 and 31553

Filed: March 22, 2006

STACY A. GIBSON,

Plaintiff-Appellant-Petitioner,

v.

ADA COUNTY, a political subdivision of Idaho; ADA COUNTY SHERIFF'S OFFICE; VAUGHN KILLEEN, acting individually and in his official capacity under color of State Law as Ada County Sheriff; R. MONTE MACCONNELL, acting individually and in his official capacity under color of State Law as Legal Advisor to the Ada County Sheriff; ARVILLE GLENN, acting individually and in his official capacity under color of State Law as a law enforcement official for Ada County under the Sheriff; SCOTT JOHNSON, acting individually and in his official capacity under color of State Law as a law enforcement official for Ada County under the Sheriff; and DOES I thru X,

Defendants-Respondents.

STACY A. GIBSON,

Petitioner-Appellant-Petitioner,

v.

Appendix 5

ADA COUNTY, a political subdivision and governmental agency of the State of Idaho, and the ADA COUNTY SHERIFF'S OFFICE,

Respondents.

COMES NOW The Plaintiff-Petitioner-Appellant, Stacy A. Gibson [hereinafter Gibson], through counsel, Vernon K. Smith, and pursuant to Rules 3, 5 and 43, I.A.R., and § 7-201 *et seq.*, Idaho Code, does request this Court grant Gibson's Petition for Writ of Certiorari and undertake to review the actions and conduct of Ada County, an inferior political subdivision and governmental agency of the State of Idaho, acting through its Board of Ada County Commissioners, Sheriff, Sheriff's Legal Advisor and Personnel Hearing Officer, in excess of or contrary to their jurisdiction, or in the absence of constitutional judicial power and authority, by reviewing records of the lower district courts and in each of Gibson's four appeals (Docket Nos. 27605, 29694, 30976 and 31553), to determine, pursuant to applicable law:

1. Whether Ada County (Payroll Department and Sheriff's Office) was non-compliant with the mandatory provisions of the *Fair Labor Standards Act* (FLSA), § 211 (c), and exceeded or acted contrary to their jurisdiction, or acted in the absence of constitutional judicial power and authority, when they ignored and failed to keep and maintain proper and accurate wage and payroll records for Gibson;

2. Whether the Ada County Sheriff, Vaughn Killeen [hereinafter Sheriff), was non-complaint with FLSA and Federal law, and exceeded his jurisdiction, or acted in the absence of constitutional judicial power and authority, when he

transferred the County's mandatory FLSA record-keeping obligations to Gibson;

3. Whether the Sheriff exceeded his jurisdiction, or acted in the absence of constitutional judicial power and authority, when he manufactured the claim of good cause to terminate Gibson's classified employment with the Sheriff's Office, when such good cause basis declared by the Sheriff and identified in the Ada County Personnel Manual, § 1-7G-3, Ada County Code (hereafter A.C.C.) do no comply with Idaho law under the void-for vagueness doctrine;

4. Whether the Sheriff exceeded his jurisdiction, or acted in the absence of constitutional judicial power and authority, when he declared Gibson's signature on incorrect pay vouchers created by the County Payroll Department, constituted a good cause basis to terminate Gibson's classified employment from the Ada County Sheriff's Office, when such good cause basis declared by the Sheriff and identified in the Ada County Personnel Manual, § 1-7G-3, A.C.C., do not comply with Idaho law under the void-for vagueness doctrine;

5. Whether the Sheriff exceeded his jurisdiction, or acted in the absence of constitutional judicial power and authority, when he declared Gibson's mistaken receipt of monies erroneously deposited by Ada County into the joint check account through the County's Direct Deposit Program, constituted good cause basis to terminate Gibson's classified employment from the Ada County Sheriff's Office, when such good cause basis declared by the Sheriff and identified in the Ada County Personnel Manual, § 1-7G-3, A.C.C., do not comply with Idaho law under the void-for vagueness doctrine, and was and caused solely from the County's incompetent

system and inability to keep and maintain accurate payroll records required by the provisions of FLSA, § 211 (c);

6. Whether the Sheriff exceeded his jurisdiction, or acted in the absence of constitutional judicial power and authority, when he declared Gibson violated provisions of the Ada County Sheriff's Office Policy Manual, and constituted good cause basis to terminate Gibson's classified employment from the Ada County Sheriff's Office, when such good cause basis declared by the Sheriff and identified in the Ada County Personnel Manual, § 1-7G-3, A.C.C., do not comply with Idaho law under the void-for vagueness doctrine;

7. Whether the Sheriff exceeded his jurisdiction, or acted in the absence of constitutional judicial power and authority, when he refused to allow Gibson the opportunity of equal protection through the provisions of § 1-7C-6(B), A.C.C., and allow a reduction in her wages to address repayment to Ada County for any erroneous overpayments made by direct deposit to the joint checking account resulting from the County's failure to comply with FLSA record-keeping mandates, and where such conduct by the Sheriff is a substantial and material breach of the covenants of good faith and fair dealing, under Idaho law;

8. Whether Ada County (through its Sheriff, Payroll Department, Human Resource Department or other Department), exceeded their jurisdiction, or acted in the absence of constitutional judicial power and authority, to deprive Gibson of her right and opportunity to engage in a *Loudermill* pre-termination hearing prior to providing Gibson official notification of intent to terminate, as identified in Gibson's "Notice of Personnel Action" on July 23, 1999 which stated: "Notice of Intent to Terminate";

9. Whether the Sheriff exceeded his jurisdiction, or acted in the absence of constitutional judicial power and authority, when he did on July 28, 1999, sign a directive with his affirmative intent to initiate termination proceedings against Gibson, prior to providing Gibson with any official notification of her right and opportunity to engage in a *Loudermill* pre-termination hearing;

10. Whether the Sheriff's Legal Advisor, R. Monte MacConnell, exceeded his jurisdiction, or acted in the absence of constitutional judicial power and authority, when he did make an extortious threat against Gibson on July 28, 1999, to the effect that if Gibson did not voluntarily resign her employment with the Sheriff's Office, she would be prosecuted for felony grand theft, all of which was done prior to providing Gibson with any official notification of her right and opportunity to engage in a *Loudermill* pre-termination hearing;

11. Whether the Sheriff exceeded his jurisdiction, or acted in the absence of constitutional judicial power and authority, when he disregarded Gibson's constitutional right to procedural due process and a meaningful opportunity to participate in a pre-termination hearing as required by the U.S. Supreme Court in *Loudermill*, before he terminated her on December 27, 1999, of her;

12. Whether the Sheriff exceeded his jurisdiction, or acted in the absence of constitutional judicial power and authority, when he breached § 1-7G-3 F, A.C.C. of Gibson's employment contract with Ada County, and placed her on administrative leave, without pay, on August 25, 1999, when the established policy and rules of the Ada County Personnel System required the Sheriff to place Gibson on administrative leave, with pay,

only, until such time Gibson had appealed the decision of the Sheriff (January 4, 2000), and, after the Sheriff had issued any written decision (December 27, 1999) concerning the disciplinary action he was imposing upon Gibson;

13. Whether the Ada County Personnel Hearing Officer, G. Lance Salladay, acting and compensated through his two year appointment by the Ada County Board of Commissioners, exceeded his jurisdiction, or acted in the absence of constitutional judicial power and authority, when he denied Gibson access to the requested information and exculpatory evidence concerning those matters affecting her FLSA wages, compensation, benefits, and the County FLSA record-keeping violations, which had caused the direct deposit overpayments into Gibson's joint checking account, when Gibson was entitled to such evidence in her defense against the charges made against her by the Sheriff during the non-agency hearing held on January 25th and January 26th, 2000;

14. Whether the 4th District Court Judge, Honorable Ronald Wilper, failed to exercise his judicial authority, or acted in the absence of proper exercise of his constitutional judicial power and authority, when he denied Gibson her vested statutory right under FLSA to engage Ada County Defendants with a "right of action" for the purpose of vindicating legal and equitable relief under FLSA, for wages Ada County owes her under the provisions of her employment contract;

15. Whether the 4th District Court Judge, Honorable Ronald Wilper, failed to exercise his judicial authority, or acted in the absence of proper exercise of his constitutional judicial power and authority, when he denied Gibson her vested statutory right under Title 42, § 1983, to employ equitable tolling and allow Gibson to engage Ada County Defendants with a "right of

action" for the purpose of vindicating legal and equitable relief under Title 42;

16. Whether the 4th District Court Judge, Honorable D. Duff McKee, failed to exercise his judicial authority, or acted in the absence of proper exercise of his constitutional judicial power and authority, when he denied Gibson any access to judicial review of the County's claim the termination of Gibson by an elected official was final, and not considering the sufficiency of Gibson's pleadings (Petition for Judicial Review, dated July 30, 2003), to be sufficient to constitute a Petition for Writ of Review (Certiorari), to review the record of Gibson's termination, and the County's denial of Gibson's constitutional right to due process, including the right to an administrative agency review hearing, the right to a final and definitive administrative agency order, and the right to access the courts for judicial review;

17. Whether the acts undertaken by the Ada County Commissioners, the Ada County Personnel Hearing Officer, the Ada County Sheriff, and the Sheriff's Legal Advisor, exceeded their jurisdiction, or acted in the absence of constitutional judicial power and authority, when these acts caused Gibson to be deprived of a vested property right in her employment, without ever being provided constitutional procedural due process, as required by Federal law; and,

18. Whether the acts undertaken by the Ada County Commissioners, the Ada County Personnel Hearing Officer, the Ada County Sheriff, and the Sheriff's Legal Advisor, exceeded their jurisdiction, or acted in the absence of constitutional judicial power and authority, when they denied Gibson her the right of constitutional due process, contrary to

well established Federal and Idaho merit system law as was declared in Hansen v. White, 114 Idaho 907, 762 P.2d 820 (1988) and Hansen v. White, 947 F.2d 1378 (9th Cir. 1991).

I. IDENTIFICATION OF PARTIES AND CAPACITIES

Stacy A. Gibson, at all times mentioned herein, was a citizen of the United States of America, a resident of Ada County, Idaho, engaged as a classified, protected and tenured status employee with the Ada County Sheriff's Office, as vested, defined by, promulgated, enacted and enforced through the terms and conditions of the Ada County Personnel System, § 1-7-1 through § 1-7L-10, A.C.C.

That Ada County is an inferior political subdivision of the State of Idaho, and a statutorily authorized government agency; that the Ada County Board of Commissioners are the elected public officials of said governmental agency; that the Ada County Sheriff's Office is a Department within this inferior political subdivision and governmental agency of said Ada County.

That Defendant, Ada County Board of Commissioners, is the Board of said inferior governmental agency, authorized by the Idaho Constitution under Article XVIII, § 5, §6, §7, §10 and §11 and State law, and at the time the events were occurring as alleged herein, said Board was acting in its official administrative agency capacity under color of State law, as the Ada County Board of County Commissioners.

That Defendant, Ada County Sheriff's Office, is a Department within said inferior political subdivision of Ada County; that Vaughn Killeen was the Ada County Sheriff at all

times alleged herein, and was engaged in that elected official capacity, under color of State law.

II. JURISDICTION, VENUE AND LIMITATIONS OF WRIT OF REVIEW

That the Idaho Supreme Court has original jurisdiction over this subject matter, and is the proper venue of this action, pursuant to and in accordance with Article V, § 9 of the Idaho Constitution, Title 7, Chapter 2, Statutes of the State of Idaho, and § 1-203, Idaho Code.

That a writ of review cannot be extended further than to determine whether an inferior tribunal, board or officer has regularly pursued its authority or has exceeded its jurisdiction, and it is equally well-established that the question of jurisdiction is to be determined by the terms of the statute, and that the question of constitutionality of the statute cannot be reviewed on certiorari. See Weiser National Bank v. Washington County, 30 Idaho 332, 164 P 1014 (1917); see also § 7-202, Idaho Code.

III. SUMMARIZED STATEMENTS OF FACTS AND ISSUES

For a Summarized Statement of Facts and Issues concerning Supreme Court Docket Nos. 27605, 29694, 30976 and 31553, see pages 4-17 of Gibson's Memorandum in Support of her Petition for Rehearing, submitted contemporaneously herewith.

IV. MEMORANDUM IN SUPPORT OF PETITION FOR CERTIORARI.

Appendix 5

Gibson's Memorandum in Support of this Verified Petition for Writ of Certiorari is contemporaneously submitted herewith.

V. PRAYER AND REQUEST FOR RELIEF

WHEREFORE, Plaintiff-Petitioner-Appellant, Stacy A. Gibson, does pray for relief as follows:

1. That the Court determine no plain, speedy or adequate remedy has been forthcoming from any Idaho court in this dispute.

2. That this Court take the appropriate judicial action, pursuant to applicable law, to review the actions and conduct of Ada County, an inferior political subdivision and governmental agency of the State of Idaho, acting through its Board of Ada County Commissioners, Sheriff, Sheriff's Legal Advisor and Personnel Hearing Officer, and vacate any meaning or effect of the "recommendatory" decision of the Ada County Hearing Officer issued February 15, 2000, as that decision is a non-agency event; vacate any meaning or effect of the proposed termination forthcoming from Sheriff Killeen, as it was not a final order of the Board (administrative agency); and enter an order confirming the full reinstatement of Gibson's employment with the Ada County Sheriff's Office, with rank, seniority, benefits, privileges, entitlements and back pay, retroactive to August 25, 1999, when Gibson was placed on administrative leave, without pay, and departmentally disciplined with termination by the Sheriff on December 27, 1999.

3. For such other and further relief as this Court may deem just and proper in the premises.

Appendix 5

Respectfully Submitted This 22nd day of March 2006.

s/ Vernon K. Smith
Vernon K. Smith
Attorney for Plaintiff-Appellant-Petitioner

VERIFICATION OF PETITION FOR WRIT OF CERTIORARI

I, Stacy A. Gibson, a citizen of the United States and resident of the State of Idaho, do hereby declare I have read the above and foregoing Verified Petition for Writ of Certiorari and the factual allegations therein, and that the facts alleged are true and correct to the best of my knowledge and belief.

s/ Stacy A. Gibson
Stacy A. Gibson
Plaintiff-Appellant-Petitioner

SUBSCRIBED AND SWORN TO BEFORE ME, this 22nd day of March 2006.

s/ Vernon K. Smith
Notary Public for Idaho
Residing at Boise, Idaho
Commission Expires: 12/20/06

APPENDIX 6 – REMITTITUR FROM THE IDAHO SUPREME COURT TO THE FOURTH JUDICIAL DISTRICT, COUNTY OF ADA, FILED MAY 9, 2006

IN THE SUPREME COURT
OF THE STATE OF IDAHO

REMITTITUR

No. 29694/30976/31553

STACY A. GIBSON[6],

Plaintiff-Appellant,

v.

ADA COUNTY, a political subdivision of Idaho; ADA COUNTY SHERIFF'S OFFICE; VAUGHN KILLEEN, acting individually and in his official capacity under color of State Law as Ada County Sheriff; R. MONTE MACCONNELL, acting individually and in his official capacity under color of State Law as Legal Advisor to the Ada County Sheriff; ARVILLE GLENN, acting individually and in his official capacity under color of State Law as a law enforcement official for Ada County under the Sheriff; SCOTT JOHNSON, acting individually and in his official capacity under color of State Law as a law enforcement official for Ada County under the Sheriff; and DOES I thru X,

Defendants-Respondents.

STACY A. GIBSON[7],

Plaintiff-Appellant,

---

[6] Idaho Supreme Court Docket No. 29694
[7] Idaho Supreme Court Docket No. 30976

Appendix 6

v.

ADA COUNTY, a political subdivision and governmental agency of the State of Idaho, and the ADA COUNTY SHERIFF'S OFFICE,

Defendants-Respondents.

ADA COUNTY[8],

Plaintiff-Respondent,

v.

STACY A. GIBSON,

Defendant-Appellant.

TO: FOURTH JUDICIAL DISTRICT, COUNTY OF ADA

The Court having announced its Opinion in this cause February 9, 2006, and having denied appellant's Petition for Rehearing on May 9, 2006; therefore,

IT IS HEREBY ORDERED that the Opinion of the Court announced February 9, 2006, be, and hereby is, FINAL; and

IT IS FURTHER HEREBY ORDERED THAT costs and attorney fees, if any, will be awarded to respondents in a subsequent order.

DATED this 9th day of May, 2006.

[8] Idaho Supreme Court Docket No. 31553. This listing of parties was absent from Opinion No. 10 released by the Idaho Supreme Court on February 9, 2006.

Appendix 6

s/ Stephen Kenyon
Clerk of the Supreme Court
STATE OF IDAHO

cc: Counsel of Record
District Court Clerk
District Judge

APPENDIX 7 – ORDER OF THE IDAHO SUPREME COURT AWARDING COSTS AND FEES, FILED MAY 12, 2006

IN THE SUPREME COURT
OF THE STATE OF IDAHO

ORDER AWARDING COSTS AND ATTORNEY FEES

NO. 29694/30976/31553

Ref. No. 03S-338

Filed: May 12, 2006

STACY A. GIBSON,

Plaintiff-Appellant,

v.

ADA COUNTY, a political subdivision of Idaho; ADA COUNTY SHERIFF'S OFFICE; VAUGHN KILLEEN, acting individually and in his official capacity under color of State Law as Ada County Sheriff; R. MONTE MACCONNELL, acting individually and in his official capacity under color of State Law as Legal Advisor to the Ada County Sheriff; ARVILLE GLENN, acting individually and in his official capacity under color of State Law as a law enforcement official for Ada County under the Sheriff; SCOTT JOHNSON, acting individually and in his official capacity under color of State Law as a law enforcement official for Ada County under the Sheriff; and DOES I thru X,

Defendants-Respondents.

A MEMORANDUM OF COSTS AND ATTORNEY FEES was filed by counsel for Respondents February 23, 2006.

Appendix 7

An OBJECTION TO MEMORANDUM OF COSTS AND FEES was filed by counsel for Appellant March 8, 2006. A REPLY TO OBJECTION TO MEMORANDUM OF COSTS AND FEES was filed by counsel for Respondents March 15, 2006. The Court being fully advised; therefore, after due consideration,

IT IS HEREBY ORDERED that Respondents' MEMORANDUM OF COSTS AND ATTORNEY FEES be, and hereby are, GRANTED and costs and attorney fees are awarded to Respondents and against Appellant as follows:

Costs:	$ 552.00
Attorney Fees:	$13,275.52
TOTAL	$13,827.52

DATED this 12th day of May, 2006.

By Order of the Supreme Court

s/ Stephen Kenyon
Stephen W. Kenyon, Clerk

cc: Counsel of Record

APPENDIX 8 – ORDER FOR JUDGMENT ENTERED BY JUDGE RONALD J. WILPER, FOURTH DISTRICT COURT (DOCKET NO. 31553), FILED MAY 25, 2006

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

Case No. CV OC 0107394D

ORDER FOR JUDGMENT

Filed: May 25, 2006

ADA COUNTY,

Plaintiff,

v.

STACY A. GIBSON,

Defendant.

IT APPEARING from the records of the above-entitled case that Plaintiff is entitled to attorney fees and costs, **IT IS HEREBY ORDERED** that Judgment be entered against Defendant and for Plaintiff in the amount of $7,143.97.

DATED this 19th day of May, 2006.

s/ Ronald J. Wilper
Ronald J. Wilper, District Judge

APPENDIX 9 – JUDGMENT FOR COSTS ENTERED BY JUDGE RONALD J. WILPER, FOURTH DISTRICT COURT (DOCKET NO. 29694), FILED MAY 25, 2006

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

Case No. CV OC 0205601D

JUDGMENT FOR COSTS

Filed: May 25, 2006

STACY A. GIBSON,

Plaintiff,

v.

ADA COUNTY, et al.;

Defendants.

The Court, having considered the Defendants' Motion for Order and Judgment for Costs, and the Court having issued the Order for Judgment, hereby concludes as follows:

Defendants are entitled to its costs of $186.00 on appeal

DATED this 24th day of May, 2006.

s/ Ronald J. Wilper
Ronald J. Wilper
District Judge

APPENDIX 10 – JUDGMENT FOR FEES AND COSTS ENTERED BY JUDGE RONALD J. WILPER, FOURTH DISTRICT COURT (DOCKET NO. 31553), FILED MAY 19, 2006

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

Case No. CV OC 0107394D

JUDGMENT FOR FEES AND COSTS

Filed: May 19, 2006

ADA COUNTY,

Plaintiff,

v.

STACY A. GIBSON,

Defendant.

The Court, having considered the Plaintiff's Motion for Order and Judgment for Fees and Costs, and the Court having issued the Order for Judgment, hereby concludes as follows:

Plaintiff is awarded its fees and costs of $7,143.97 on appeal.

DATED this 19th day of May, 2006.

s/ Ronald J. Wilper
Ronald J. Wilper, District Judge

APPENDIX 11 – ORDER FOR JUDGMENT ENTERED BY JUDGE RONALD J. WILPER, FOURTH DISTRICT COURT (DOCKET NO. 29694), FILED MAY 19, 2006

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

Case No. CV OC 0205601D

ORDER FOR JUDGMENT

Filed: May 19, 2006

STACY A. GIBSON,

Plaintiff,

v.

ADA COUNTY, et al.;

Defendants.

IT APPEARING from the records of the above-entitled case that Defendants are entitled to costs, **IT IS HEREBY ORDERED** that Judgment be entered against Plaintiff in the amount of $186.00.

DATED this 19th day of May, 2006.

s/ Ronald J. Wilper
Ronald J. Wilper
District Judge

APPENDIX 12 – ORDER FOR JUDGMENT ENTERED BY JUDGE JOEL HORTON, FOURTH DISTRICT COURT (DOCKET NO. 30976), FILED MAY 19, 2006

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

Case No. CV OC 0305850D

ORDER FOR JUDGMENT

Filed: May 19, 2006

STACY A. GIBSON,

Petitioner,

v.

ADA COUNTY, a political subdivision and governmental agency of the State of Idaho AND THE ADA COUNTY SHERIFF'S OFFICE,

Respondents.

IT APPEARING from the records of the above-entitled case that Respondents are entitled to attorney fees and costs, **IT IS HEREBY ORDERED** that Judgment be entered against Petitioner in the amount of $6,497.55.

ORDERED this 19th day of May, 2006.

s/ Joel Horton
Joel Horton, District Judge

APPENDIX 13 – JUDGMENT FOR COSTS AND FEES ENTERED BY JUDGE JOEL HORTON, FOURTH DISTRICT COURT (DOCKET NO. 30976), FILED MAY 19, 2006 -

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

Case No. CV OC 0305850D

JUDGMENT FOR FEES AND COSTS

Filed: May 19, 2006

STACY A. GIBSON,

Petitioner,

v.

ADA COUNTY, a political subdivision and governmental agency of the State of Idaho AND THE ADA COUNTY SHERIFF'S OFFICE,

Respondents.

The Court, having considered the Respondents' Motion for Order and Judgment for Costs, and the Court having issued the Order for Judgment, hereby concludes as follows:

Respondents are entitled to its fees and costs of $6,497.55 on appeal.

ORDERED this 19th day of May, 2006.

s/ Joel Horton
Joel Horton, District Judge

APPENDIX 14 – MEDICAL RECORDS OF F. LAMARR HEYREND, M.D. DATED JUNE 23, 2005, VERIFYING GIBSON SUFFERS PSYCHOLOGICAL WORKPLACE INJURY (PTSD DIAGNOSIS) CAUSED BY ADA COUNTY'S MISCONDUCT

June 23, 2005

Patient: Stacy A. Gibson
DOB: August 30, 1958

PATIENT HISTORY:

I initially examined Ms. Gibson on October 16, 2002. Ms. Gibson's husband, John Gibson, referred Ms. Gibson to me as a patient after he had consulted with Dr. Stephen E. Spencer, M.D. Ms. Gibson was experiencing extreme emotional and mental disturbances, and resulting physical injuries she claimed to have initially experienced and first began to suffer since July 20, 1999 and progressing thereafter, as a result of her psychological workplace injury. I immediately placed Ms. Gibson in an outpatient psychiatric treatment program through my office, and Ms. Gibson has been receiving outpatient medical care from me since October 2002 to the present date. She originally received medical care from Dr. Spencer on July 23, 1999 for this psychological workplace injury, which she described had occurred on June 20, 1999 and continued thereafter. The historic facts and events that caused Ms. Gibson's injuries have been described to me as follows:

> In early 1997, Ms. Gibson wanted a career with law enforcement, and on July 10, 1997, became employed as a Records Technician with the Sheriff's Office,

located at the Boise State University (PSU) Substation. Ms. Gibson was employed there as a non-commissioned officer (no arrest powers) to October 15, 1998, when she was promoted and transferred to the main Jail Facility as a Jail Technician. At the time of Ms. Gibson's transfer, her gross wages were $1,500.00 a month, and the County Payroll Department had been directly depositing her wages into a joint checking account she had with her husband.

Sometime after Ms. Gibson's transfer to the Jail Facility, and before November 1, 1998, the Ada County Payroll Department created errors in Ms. Gibson's wages. Instead of paying Ms. Gibson the wage due her at $1,575.00 a month, in light of the increase from her promotion, the Payroll Department calculated wages incorrectly by combining her old wage of $1,500.00 with a new wage figure of $1,550.00, creating an erroneous wage of $3,050.00, and that incorrect figure was then directly deposited each month into the joint checking account. The County Payroll Department continued this error for eight (8) months. Because Ms. Gibson had no involvement with the check register or accounting process, and Mr. Gibson never opened bank statements or balanced the checking account on any occasion, as a consequence of his busy work schedule selling farm equipment, they were both unaware of what sum was actually deposited into their account.

To add to the confusion, from January 1, 1999 through June 30, 1999, Ms. Gibson worked beyond her scheduled shifts of four days on, four days off (ten hour days), and accrued 281 hours of overtime. During this same period, Ms. Gibson completed 204 hours of

correspondence courses sponsored and recommended by the County Sheriff's Office.

Finally, on July 19, 1999, the Sheriff's Office discovered errors had been created in accounting, which at first was thought to be underpayment of wages due employees for overtime hours owed to nine (9) County employees. Ms. Gibson was one of the nine. After further examination, Payroll thought there may also be an issue of an overpayment of some wages to Ms. Gibson. The County Sheriff thereupon ordered two (2) detectives to conduct an internal investigation on the wages of Ms Gibson only. On July 20, 1999, and while she was on medical leave from outpatient back surgery, Ms. Gibson received a phone call from one of the detectives while she was still recovering at home. The detective requested she come to the Sheriff's Office. Ms. Gibson assumed the request was for her to again participate in some special project, as she was known by the Department as an employee willing to accept overtime and special work assignments, which she elected to do, as she believed would help advance her career.

For two and one-half (2 ½) hours on July 20, 1999, these two Sheriff detectives interrogated Ms. Gibson about the County wage errors and chose to threaten her with intrusive techniques; they called her a thief and a liar, claimed she had collaborated with others in the Payroll Department to intentionally cause overpayments into the account, and threatened her with criminal prosecution, saying she committed felony grand theft and threatened her with incarceration. Ms. Gibson perceived these threats as destroying her career,

Appendix 14

her job and her life, causing immediate impact to her physical health and fear for her very safety and security.. It was the same as a death threat to her, as she was before made aware of what happens to law enforcement personnel who go to jail.

Ms. Gibson told the detectives she had no knowledge of overpayments to the joint account; that all aspects of payroll record-keeping was not her responsibility; she had nothing to do with balancing the joint checking account, but did agree that if any excess wages had been deposited, and a refund was needed, the County could take her accrued comp time, overtime, holiday time and vacation time, as a good faith showing, and the County could then complete a full reconciliation of her wage and benefit records, and determine what remained and how the issue could be resolved.

Approximately one week following this interrogation, on July 28, 1999, Ms. Gibson's attorney, Mr. Vernon K. Smith, received a phone call from R. Monte MacConnell, Sheriff's Legal Advisor. I have been advised Mr. MacConnell told Mr. Smith the Sheriff wanted Ms. Gibson terminated, and if she did not resign from the Sheriff's Office, she would be processed with felony charges for grand theft and would then be fired immediately. A cascade of events followed, including statements expressed by the Ada County Sheriff and his agents, saying Ms. Gibson was somehow involved in the error, the effect of which was to escalate the County's errors into contention Ms. Gibson was at fault, and either she knew or should have known of the overpayments, and she had a responsibility to report it.

Appendix 14

It was later confirmed by the events on December 16th and 17th, 1999, Ms. Gibson had been officially under surveillance (stalked) by Sheriff detective(s), and was linked solely to these administrative overpayment errors.

Then I was advised, while the investigation continued, Ms. Gibson was placed on administrative leave, without pay, and remained on that inappropriate status until December 27, 1999, when the Sheriff chose to terminate Ms. Gibson, as she refused to resign her employment over the County's accounting errors.

I was also advised that at all times before the July 20, 1999 interrogations began, Ms. Gibson had always been regarded as an exemplary employee; she had never received an unsatisfactory rating, and was deemed an excellent asset to the Sheriff's Office.

Since my initial examination of Ms. Gibson, I have observed her become re-victimized by certain specific events that relate to Ada County's ongoing treatment and conduct against Ms. Gibson, including events that have developed in proceedings involving more intrusive examinations to further assess or diagnose her condition.

I hold the medical opinion Ms. Gibson was re-victimized as a result of the examinations resulting from the orders of June 19, 2003 and April 12, 2005, entered by the Industrial Commission, requiring Ms. Gibson be confronted by Dr. Cynthia Brownsmith, a psychologist, asked to address her condition. Ms. Gibson complied with those orders entered by the Industrial Commission, and Dr. Brownsmith conducted evaluations of Ms. Gibson on June 20, 2003, June 24, 2003,

July 11, 2003, and again on April 14, 2005. These encounters caused her to relive the trauma, and repeat the damages.

Because of the challenges made by Ada County and the State Insurance Fund, essentially claiming Ms. Gibson's Workmen's Compensation claim should be viewed as a "mental-mental" workplace injury instead of a "mental-physical", I saw it would be beneficial and educational to the State Insurance Fund to demonstrate the objective nature of her physical injury, and I did then conduct an electroencephalogram (EEG) brain map diagnostic testing of Ms. Gibson, conducted in my office on March 31, 2005. The data collected from Ms. Gibson's EEG has provided an objective analysis of my original opinion, and has confirmed my October 16, 2002 medical opinion Ms. Gibson is suffering from a psychological workplace injury, and this resulting condition is described as a "mental-physical" injury, known as Post Traumatic Stress Disorder, and must be recognized as a compensable claim under Idaho Workmen's Compensation law.

During the recent re-victimization by Dr. Cynthia Brownsmith on April 14, 2005, the session Ms. Gibson was required to endure was video taped, and I have observed this session and conclude it was unwarranted and intrusive conduct of Dr. Brownsmith as she was unable to manage the stress created when she became unable to effectively reply to Ms. Gibson's questions and concerns about the multitude of inaccuracies, fabrications and misstatements found in Dr. Brownsmith's August 27, 2003 report.

Shortly after Ms. Gibson's explosive outburst on April 14, 2005, it was necessary for my office to examine Ms. Gibson and stabilize her from that confrontational experience. Ms. Gibson was further examined in my office on April 15, 2005.

Appendix 14

In my effort to stabilize Ms. Gibson, following this re-victimization by Dr. Brownsmith, I prescribed Guanabenz to balance the locus caeruleus aspect of Ms. Gibson's brain, which will reduce anxiety, and structure a pathway for our continuing psychotherapy sessions. However, prescribing medications to help calm depression and anxiety does not make a patient immune from re-victimization efforts caused by intrusive and confrontational examinations. I understand further examinations are proposed to take place by Dr. Richard Wilson.

In my May 6, 2005 letter to Mr. Vernon K. Smith, I emphasized my concern any further re-victimizing evaluations of Ms. Gibson must cease, as intrusive medical evaluations conducted by medical advocates, as they are clearly perceived as such by Ms. Gibson, are causing more re-victimization, and that only continues to intensify the symptomatology of Ms. Gibson's Post Traumatic Stress Disorder, and serves to hinder my efforts that focus on treating Ms. Gibson's condition, causing medications and more psychotherapy sessions to address damage control from what is being senselessly caused.

Ms. Gibson is of the personality type that falls in the subset of people who more easily downgrade to the "fight or flight", a system found in all mammals. They are the ones in a group who more easily develop Post Traumatic Stress Disorder or traumatic neurosis. Ms. Gibson is a person who is clearly more reactive and sensitive than the average person. In other words, she responds more sharply to verbal assaults, feels more intensely and has a decreased pain tolerance. She is in the subset of people that develop Post Traumatic Stress Disorder more easily.

Appendix 14

CLINICAL IMPRESSION/MENTAL CONDITION:

As a result of my October 16, 2002 evaluation, I determined Ms. Gibson exhibited symptoms of short-term memory loss, panic attacks, anxiety, hyperreactivity, depression, feelings of loss of self-esteem, and intrusive recollection.

I initially diagnosed Ms. Gibson to be suffering from Post Traumatic Stress Disorder (PTSD), classified as constituting a "mental-physical" injury, and caused as a result of the catastrophic, intrusive and threatening course of conduct utilized by detectives (co-employees if you will), who were ordered to interrogate Ms. Gibson on July 20, 1999. This condition has not and will not resolve fully. On March 31, 2005, I conducted an EEG on Ms. Gibson to demonstrate an objective means of conducting my ongoing findings that support that clinical diagnosis of PTSD, and to determine the ongoing extent of her mental and physical injuries. Findings of that assessment are that Ms. Gibson has lived with the following since the events of July 20, 1999:

- Intrusive memories of the interrogations on a daily basis
- Sleep disturbances where she awakens from nightmares in a panic state
- Emotionally distant, withdrawn and isolated from others
- Loss of interest in social and other activities
- Hypervigilance and startled reactions as a daily activitity
- Avoidance of activities that arouse memories or trauma, such as anything to do with Ada County and the Ada County Sheriff's Office

Appendix 14

- She gets angry and agitated with mixed episodes of depression
- Difficulty with authority figures, and a hard time dealing with others
- An occasional fugue state, accompanied by short-term memory loss and anxiety
- Headaches, stomachaches, dizziness, blurred vision, fatigue and excessive sweating and chills
- Panic attacks, flashbacks, feelings of helplessness, paranoia, insecurity and lack of confidence

Ms. Gibson has been traumatized and does experience progressively worsening anger, irritability, difficulty sleeping, and sometimes unprovoked rage frightening to her and to those around her, especially those in her family that have experienced the change. During the first thirteen (13) months following the events of July 20, 1999, Ms. Gibson remained severely traumatized from the experience she suffered and endured, and due to that condition, she remained unemployed until the month of August 2000. During that period, my opinion is Ms. Gibson suffered from Post Traumatic Stress Disorder, to the extent of being Severe. Since then, taking into consideration her medical history, symptoms, interview behavior, EEG and then having stabilized to the degree to be able to maintain some degree of employment, it would indicate she now suffers from Post Traumatic Stress Disorder in the Moderate Range.

Axis I 309.81	Post Traumatic Stress Disorder, Moderate
Axis II 296.3	Major Depressive Disorder
Axis III	None

Appendix 14

Axis IV	Occupational and Social Impairments with deficiencies in many areas
Axis V	Global Assessment Functioning 55 (current). In the last year 55 to 65

s/ F. LaMarr Heyrend, M.D.
F. LaMarr Heyrend, M.D.
Clinical Psychiatrist

enc: April 4, 2005 EEG/Evoked Potential Review of March 31, 2005 EEG
April 15, 2005 Special Core Evaluation

Appendix 14

Intermountain Neuropsychiatric Center
411 Allumbaugh Street
Boise, Idaho 83704
(208) 376-2518

PATIENT: **Gibson, Stacy**
DOB: 08-30-1958
GENDER: **Female**
DATE: 04-04-05

EEG/EVOKED POTENTIAL REVIEW

EEG: As we go looked at Stacy's total record, we found that she frequently has increased frontal activity, frequently has standard deviations that are in excess of two frontally, frequently has dropout of the right posterior quadrant in P300s. She has extremely low voltage in her eyes open post-hyperventilation study, eyes closed resting study, and the eyes open alert study. In fact, we can safely say that in general she is running at about 25% of the μV^2 that we expect. This is often seen in affective disorders.

On the EEG, we find frontal alpha. Frontal alpha is related to a predisposition to become depressed and hyperactive to stress. Thus, as we look at her study more we recognize that she clearly is disinhibited in the right frontal quadrant. Therefore, the area in which we "put on the brakes" when you become upset is not very functional. Therefore, it is not surprising that she can really get upset, throw dishes, and so forth.

With the increased beta, which is related to anxiety, with the frontal alpha, and with the low voltages in terms of μV^2 on the EEG, we have the pattern of the person who is suffering from generalized anxiety reaction, an affective –

disorder, and one who manifests mood instability because of abnormal activity in the right frontal quadrant, which is the area that "puts on the brakes" when one becomes angry or upset.

EVOKED POTENTIAL: As we look at the evoked potentials, we find that the P300s, which are the imprinting waveform for the end of short-term memory, they tend to lateralize away from the right posterior quadrant towards the left and are not good from the standpoint of morphology. The latency is acceptable. That is the time that it takes for them to form. Certainly, efficient, effective imprinting is questionable because of poor morphology and the fact that they are broken up.

DISPOSITION/PLAN:

Therefore, we can clearly see that we have a person who is in the group of hyperfrontal people with affective disorders, anxiety disorders, and panic disorders that are susceptible development of PTSD. We all know that not everyone develops PTSD but there is a subset that do. What we find is this woman is representative of these findings. Please refer to Veteran's Administration EEG findings in PTSD.

Thus, very clearly what happens is that you have a woman who has a weak ego in that she has had a great deal of difficulty in her life in terms of becoming what she feels she should be and should become, and she finds a career as a police office that solves problems and gives her a good identify, and "presto", she is taken aside and told that her career is over and she is going to the penitentiary, and that she should understand what is going to happen to her. In other

words, they are pointing out to her what happens to police officers in jail. To her, this was a death threat. It would simply rip her life apart. In addition, to have three of her associates put her in a room and pound on her is an unreasonable approach.

In terms of intrusive feelings from watching television, in terms of dreams, and in terms of scanning and being fearful, we can understand. In terms of the fact that she has some problems with gating and flooding of her mind because the input module to her mind is wide open, this tends to decrease the quality of cognition and increase anxiety. With high-anxiety and panic reactions already, it is very easy for her to downgrade the control of the locus caeruleus, the nucleus amygda, and hippocampus, and the flight of fight response (which is what panic is) was brought about.

In retrospect, there is absolutely no question that she would qualify for traumatic neurosis, as defined in DSM-II and DSM-III, and she qualifies for PTSD on the basis that a life-threatening event did, in fact, occur and she felt she was about to be destroyed.

s/ F. LaMarr Heyrend, M.D.
F.L. Heyrend, M.D.
FLH/kvh (752)

Appendix 14

Intermountain Neuropsychiatric Center
411 Allumbaugh Street
Boise, Idaho 83704
(208) 376-2518

PATIENT: **Gibson, Stacy**
DOB: --
GENDER: --
DATE: 04/15/05

SPECIAL CORE EVALUATION

What we have is a situation where we have to recognize that she became grossly upset when she went for an interview and evaluation with the psychologist that her attorney [counsel for Ada County], Mr. Baumann, arranged. She became extremely anxious and had to leave the interview. Her husband then talked to the psychologist, Cynthia Brownsfield [Brownsmith]. He pointed out that all Stacy wanted to accomplish is that the previous record be corrected. He was concerned about the fact that the record was incorrect and they just wished to bring the record into line

I then explained several things. First, I do not look at psychological dynamics the same way I look at neurophysiology. As such, I know that panic attacks involve the locus caeruleus or red nucleus and the hippocampus. This is part of the original reptilian "fight or flight" system. Of course, the locus caeruleus is paired with the nucleus of Raphe and the two of them are in the midbrain (the center of the brain), magenta colored, and that is the autonomic nervous system (sympathetic and parasympathetic). The sympathetic is, of course, the nucleus caeruleus. Therefore, as we look at the situation, we can see that if you have to have all of the noradrenalin responses go through the nucleus of caeruleus

Appendix 14

then, in fact, having it in as tight of regulation as possible will assist in controlling panic attacks. At this particular point, I insisted that Stacy take guanabenz (because it is an alpha-agonist), going up to 4mg b.i.d., to try to balance out the locus caeruleus. This would cause her to have less anxiety. She did not wish to take more medicine but I said that plus Gabitril 4mg b.i.d. might very well handle the anxiety reaction that she is having.

I explained that if you take 100 people, only about 10% develop PTSD in traumatic experiences and these people are predisposed because the locus caeruleus is easy to downgrade. I pointed out that the guanabenz 4mg b.i.d. would help to stabilize and strengthen the locus caeruleus and would help her depression and anxiety. I suggested that Gabitril would be the next addition and that the amount of Xanax she then needs would be considerably reduced. I pointed out the fact that on her EEG, particularly her eyes open alert, her high beta activity is directly related to her anxiety and her PTSD. This has been established through the Veteran's Administration, who accept EEG computerized evaluations because it does show increased beta as one of the signs that says people have PTSD.

PLAN:

- In any event, we had a very long discussion, approximately 50 minutes. I also pointed out to John [Stacy's husband] how to put together a chart that would help the jury to understand where I am coming from in terms of the problem

s/ F.L. Heyrend, M.D.
F.L. Heyrend, M.D.
FLH/kvh (929)

APPENDIX 15 – JUDGMENT ON MOTION FOR SUMMARY JUDGMENT AND MOTION TO STRIKE ENTERED BY JUDGE RONALD J. WILPER, FOURTH DISTRICT COURT (DOCKET NO. 31553), FILED DECEMBER 16, 2004

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

Case No. CV OC 0107394D

JUDGMENT AS TO MOTION FOR SUMMARY JUDGMENT AND MOTION TO STRIKE

Filed: December 16, 2004

ADA COUNTY,

Plaintiff,

v.

STACY A. GIBSON

Defendant.

This matter having come on for hearing on December 9, 2004, the Court having granted Plaintiff's Motion for Summary Judgment and denying Plaintiff's Motion to Strike, and the Court having entered its Memorandum Decision and Order Granting Plaintiff's Motion for Summary Judgment on December 10, 2004.

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

Appendix 15

1. The Plaintiff's Motion for Summary Judgment is granted and Defendant owes the Plaintiff $8,528.89 for overcompensated salary.

2. The Plaintiff's Motion to Strike Defendant's Affidavit is denied.

DATED this 14th day of Dec., 2004.

s/ Ronald J. Wilper
Ronald J. Wilper
District Judge

APPENDIX 16 –DECISION AND ORDER GRANTING [ADA COUNTY] MOTION FOR SUMMARY JUDGMENT ENTERED BY JUDGE RONALD J. WILPER, FOURTH DISTRICT COURT (DOCKET NO. 31553), FILED DECEMBER 10, 2004

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

Case No. CV OC 0107394D

MEMORANDUM DECISION AND ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Filed: December 10, 2004

ADA COUNTY,

Plaintiff,

v.

STACY A. GIBSON

Defendant.

This matter came before the Court on the Plaintiff's Motion for Summary Judgment. On December 9, 2004 the Court heard oral argument on the matter and GRANTED Plaintiff's motion. This written decision constitutes the Court's findings of fact and conclusions of law.

BACKGROUND

This is action for return of overpaid compensation by an employer to an employee. The Defendant was a Records Clerk

for the Ada County Sheriff's office earning a salary of $1,500.00 per month. She eventually received permanent status and became a "classified" employee. Once classified she could only be dismissed for cause. She was then promoted to the position of Jail Technician II, her salary was increased to $1,550.00 per month. Due to a payroll error she actually received over $3,000.00 per month for several months and was over compensated in the amount of $8,528.89. She was eventually terminated by the Sheriff for retaining these overpayments. Ada County filed its lawsuit on a restitution/unjust enrichment theory to recover the money. This matter is before the Court on the Plaintiff's motion for summary judgment on its claim for $8,528.89.

ANALYSIS

The elements of unjust enrichment are: "(!) a benefit is conferred upon defendant by plaintiff, (2) appreciation by the defendant of the benefit, and (3) acceptance of the benefit under circumstances that would be inequitable for the defendant to retain the benefit without payment of the value thereof". Aberdeen-Springfield Canal Company v. Peiper, 133 Idaho 82, 88 (1999).

The Court finds that a benefit was conferred upon the Defendant by the Plaintiff, as the Plaintiff continued to pay her salary as a Records Clerk after they had promoted her to the post of Jail Technician II, therefore she was receiving two salaries for doing one job. The Court finds that the Defendant did appreciate and accept the benefit of the overpayment. The Defendant admitted that she was overcompensated and intended to repay the money. The Court also finds that it would be inequitable for the Defendant to retain the additional

money that she was paid. Thus, the Court finds that Defendant was unjustly enriched.

The Defendant contends that there is a discrepancy over the precise amount of money that the Plaintiff claims. The Court does not find that this is the case. The Court finds that Cheryl Bower, the Controller at the Ada County Clerk/Auditor/Recorder's Office, and Kelli Bolicek, Finance Manager at the Ada County Sheriff's Office, are competent and qualified to provide information on the amount of the overpayment. Both Ms. Bower and Ms. Bolicek have submitted affidavits and calculations showing that $8,528.29 is the amount that was overpaid and must be repaid by the Defendant to the County. The Court accepts these calculations as accurate. Defendant has not presented any evidence to show why the figure of $8,528.89 is incorrect. Defendant has also failed to provide any accounting of her own.

The Court could grant summary judgment on the claim itself and then appoint an auditor to determine the precise amount owed by Defendant if it found that that the amount calculated by Ms. Bower and Ms. Bolicek was inaccurate or at least reasonably questionable. However, the Court does not believe that that is necessary in this case.

The Plaintiff filed a motion to strike an affidavit filed by the Defendant in opposition to the motion for summary judgment. The motion to strike is denied. However, the assertions contained in the affidavit are entitled to little weight and do not raise a genuine issue of material fact.

Appendix 16

CONCLUSION

Based upon the foregoing analysis, the Court hereby GRANTS summary judgment in favor of the Plaintiff and DENIES the Plaintiff's motion to strike. The Plaintiff shall submit a judgment form for the Court's signature.

IT IS SO ORDERED.

DATED this 10th day of December, 2004.

s/ Ronald J. Wilper
Ronald J. Wilper
DISTRICT JUDGE

APPENDIX 17 – MEMORANDUM IN SUPPORT OF [GIBSON] MOTION FOR PERMISSION TO APPEAL FROM DISTRICT COURT'S INTERLOCUTORY ORDER ENTERED SEPTEMBER 16, 2004 BY JUDGE RONALD J. WILPER, FOURTH DISTRICT COURT (DOCKET NO. 31553), LODGED DECEMBER 9, 2004

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

Case No. CV OC 0107394D

MEMORANDUM IN SUPPORT OF MOTION FOR PERMISSION TO APPEAL FROM DISTRICT COURT'S INTERLOCUTORY ORDER ENTERED SEPTEMBER 16, 2004

Filed: December 9, 2004

ADA COUNTY,

Plaintiff/Counterdefendant,

v.

STACY A. GIBSON

Defendant/Counterclaimant.

INTRODUCTION

The Defendant/Counterclaimant above-named, through counsel, Vernon K. Smith, pursuant to Rule 12, I.A.R., has requested this Court to enter an order, thereby granting Defendant judicial permission to appeal the District Court's

interlocutory order entered September 16, 2004, to the Idaho Supreme Court for Appellate Review in order to bring into focus controlling questions of law as follows:

1. Whether Ms. Gibson has a Federal statutory right under the *Fair Labor Standards Act* (FLSA), 29 U.S.C. § 216 (b), to initiate and assert her claims for relief against her employer, Ada County, as addressed in her Second Amended Counterclaim, and to pursue her right to recover back pay due for regular wages, overtime wages, and employment entitlements and benefits, in accordance with her protected status as a permanent and classified Ada County employee, which specifically includes her rights to sick leave, vacation pay, additional holiday pay, additional overtime pay, step increases, cost of living increases, continued medical insurance benefits, continued family coverage benefits, continued life and disability insurance, Workman's Compensation coverage, all retirement benefit funds for PERSI (representing 6% of total monthly wages) and PEBSCO (an employee contributory retirement plan), together with available training benefits, and recovery of all other benefits as a result of the inadequate wage and record-keeping procedures that caused the administrative error and overpayment of her wages into a joint checking account under the direct deposit system used by Ada County, through its Payroll Department, resulting in Ms. Gibson's mistaken receipt of funds from the County's negligence and ongoing violations of the FLSA provisions announced in 29 U.S.C. § 201 *et seq*. It was these erroneous overpayment of wages to that account, without her knowledge, that has resulted in actions taken by the Ada County Sheriff, Vaughn Killeen, to initiate malicious and capricious interrogations, threats of termination, violations of her Merit System protection and property rights, and causing Ms. Gibson to suffer a

psychological workplace injury, and then, in a retaliatory and discriminatory manner, and contrary to Federal law (FLSA), Sheriff Killeen did then terminate her employment with Ada County, which has denied all efforts at exhausting any of her administrative due process remedies.

2. Whether Ms. Gibson has a Federal statutory right under the *Fair Labor Standards Act* (FLSA), 29 U.S.C. § 216 (b), to initiate and assert a claim for relief against her employer, Ada County, as addressed in her Second Amended Counterclaim, including the reinstatement of her Ada County employment, resulting from the discriminatory and retaliatory manner in which the Ada County Sheriff, Vaughn Killeen, terminated her employment with the Ada County Sheriff's Office, as a result of the inadequate and incorrect wage and record-keeping procedure that caused an administrative payroll error and overpayment of Defendant's salary into a joint checking account under the direct deposit system used by the County, resulting in Defendant's mistaken receipt of funds from the County's negligence and ongoing violations of the FLSA provisions announced in 29 U.S.C. § 201 *et seq*.

3. Whether Ms. Gibson has a Federal statutory right under the *Fair Labor Standards Act* (FLSA), 29 U.S.C. § 216 (b), to initiate and assert a claim for relief against her employer, Ada County, as addressed in her Second Amended Counterclaim, including recovery of liquidated damages equal to two (2) times the recovery of back pay and benefits as addressed in Paragraphs No. 1 & 2 above.

4. Whether Ms. Gibson has a Federal statutory right under the *Fair Labor Standards Act* (FLSA), 29 U.S.C. § 216 (b), to initiate and assert a claim for relief against her employer, Ada County, as addressed in her Second Amended Counterclaim,

including recovery of costs and attorney fees associated with her litigation in this matter for the reinstatement of her employment, and recovery of back pay and benefits as addressed in Paragraphs No. 1 & 2 above.

5. Whether Ms. Gibson, as a prerequisite to initiating her Federal statutory right under the *Fair Labor Standards Act* (FLSA), 29 U.S.C. § 216 (b), is required to submit a "notice-of-claim" to Ada County pursuant to the *Idaho Tort Claims Act*, § 6-906, as a condition precedent to initiating this claim to enforce her federally established and protected statutory rights to unconditional relief as addressed in her Second Amended Counterclaim, and referenced in Paragraphs No. 1, 2, 3 & 4 above.

6. Whether the lower court obstructed and deprived Ms. Gibson the constitutional right to procedural due process concerning her employment property rights and the wages owed to her by Ada County, when the lower court denied access to judicial remedies concerning her Federal statutory "right of action" pursuant to the *Fair Labor Standards Act*, 29 U.S.C. § 201 *et seq*.

Ms. Gibson does contend the subject matter in this dispute does involve controlling questions of law, of great public interest, with a potential of affecting any one of the many employees of Ada County, and the action of this District Court to preclude this Defendant from properly asserting her "right of action", affirmative defenses and causes of action addressed in her Second Amended Counterclaim, is contrary to existing Federal and State case law.

Appendix 17

STATEMENT OF FACTS

Defendant filed her Answer, Affirmative Defenses and Counterclaim in this case on May 7, 2002, therein providing detailed facts surrounding Defendant's employment and the protection and rights afforded her under the provisions of the Ada County Code, County Personnel System, § 1-7-1 through § 1-7L-10 and specifically the Federal protection laws concerning employment, entitled the *Fair Labor Standards Act*, 29 U.S.C. § 201 *et seq.*, that applied to Defendant's employment under the statutory scheme of Federal law and specific language contained in the Ada County Code, § 1-7C-1.

On July 11, 2002, Defendant requested this Court to amend her counterclaim to specifically describe the detail of her allegations, and the manner in which Ada County and its Sheriff's Office violated her rights and provisions of the *Fair Labor Standards Act*, 29 U.S.C. § 201 *et seq.* It was the consequence of those County violations that caused the mistaken receipt of funds to become an issue. The effect of the overpayments was used to wrongfully terminate Defendant, as they used the errors caused from the erroneous wage and record-keeping process used by Ada County and the Payroll Department. This administrative error was due to the flawed accounting process used in 1998 and 1999, and remained in effect until this ongoing non-compliance was made a major issue of concern, and administrative efforts were taken by the County to come into some level of compliance with Federal mandates, undertaken about January 10, 2002.

On February 19, 2003, this Court signed an Order (prepared by counsel for Ada County) denying Defendant's Motion to Dismiss the County's Complaint, and denied Defendant's Motion to Amend Counterclaim, "sought to

include an additional cause of action under the Fair Labor Standards Act, 29 U.S.C. § 211 (c)". The effect of the Order was to deny Defendant her statutory right to a cause of action, her constitutional right to have due process of law, and a right to engage a judicial forum to seek redress for the County's abuse of due process and FLSA violations, and if left to stand, as ordered, it would allow the County to escape judicial review and imposition of sanctions for their wage and record-keeping violations, causing Gibson's termination from the County's non-compliance of mandatory law. Their violation of these employee rights, privileges and protections under the law are founded in the enforcement of Federal laws, subject to appropriate enforcement in a state's judicial forum. These rights of enforcement cannot be waived, modified or precluded, as a matter of law, for employer violations identified as an employee dispute concerning salary and wage matters, such as record-keeping, under payments, overpayments, equal pay or employee benefits.

Defendant filed a Motion, supported with a Memorandum, requesting this Court reconsider that February 19, 2003 Order. Defendant provided authority for the Court's reference, demonstrating the manner and nature by which the Federal courts have ruled on employment rights under the *Fair Labor Standard Act*, and that employment rights cannot be thwarted, abridged or waived; that the *Act* cannot be construed in any narrowing manner; that the employer is responsible for "knowledge" and "management" of the *Act*; the *Act* compels the employer (solely) to make, keep and preserve accurate employee wage records; that under no circumstance or condition, and at no time, or for any reason, may the employer transfer or attempt to transfer responsibility under the *Act* to the employee; that failure of the employer to comply with any

provision of the *Act* is at the employer's own peril, and the employer is subject to ramifications and sanctions.

Defendant supplemented that Memorandum on April 8, 2003, providing additional authority to support that Motion, which confirmed Ada County knowingly violated FLSA, and had been in a continuing state of non-compliance for a period of years, and the County Commissioners, in their last administration, and following Defendant's termination and fear of ramifications from their misconduct, attempted compliance with the *Act* by January 10, 2002. We attached documents, specifically addressing this fact, and the frantic realization they needed to become compliant, to some meaningful degree, or face consequences. We showed the Court the Gallagher case, and the FLSA violations involving his wrongful treatment at the hands of Ada County.

Without detail, the Court denied Defendant's Motion to Reconsider, on April 18, 2003 The Court's ruling was absent Findings of Fact or Conclusions of Law. A Finding of Fact was deemed essential by Defendant, as some factual findings had to be made to conclude why Defendant would not be allowed a fundamental right of due process and a statutory right to enforcement of the provisions of FLSA.

Findings and Conclusions would have clarified the lingering misperception advanced by the County, so the issues would be clear when presented for appellate review.

On May 2, 2003, Defendant moved for Permission to Appeal the District Court's Interlocutory Order entered February 19, 2003, requesting the Court enter an order granting Defendant permission to appeal the District Court's interlocutory order to the Idaho Supreme Court, in order to

bring into focus this fundamental and controlling question of the application of the *Fair Labor Standards Act* (FLSA), the legitimate claims raised by Defendant, the rights of Defendant and violations of the wage and record-keeping procedure by Ada County and the Payroll Department. The facts were clear the administrative error caused the overpayment into the joint checking account under the direct deposit system, resulting in Defendant's mistaken receipt of wages, all due to the County's violation of the FLSA provisions announced in 29 U.S.C. § 211 (c).

Defendant did contend the issues involved a controlling question of law, the application of FLSA as a defense and as a statutory right to a cause of action, and the Court's Order precluded Defendant from asserting her rights. Defendant demonstrated the Order was contrary to existing Federal law, and did prevent her from advancing her statutory rights to maintain the claims as provided for in her Second Amended Counterclaim and subsequent pleadings. Defendant scheduled the Motion for Permissive Appeal for hearing, and it came before the Court on June 11, 2003, as scheduled, and the Court stated, upon further analysis, Ms. Gibson did have a cause of action pursuant to the *Fair Labor Standards Act*, and the Court would allow Defendant the right to submit an amended Counterclaim because Plaintiff had not filed its reply to the original counterclaim. Because of that statement, it was no longer necessary to pursue the Motion for Permissive Appeal, based upon what the Court said. This all took place "off the record", as the Court said, "we are not on record". It now appears counsel for Ada County is confused as to the June 11, 2003 hearing scheduled before the Court to decide the Motion whether to grant or deny Defendant's Motion for Permissive Appeal. See Affidavit of Ray J. Chacko in Support of the County's Supplemental Memorandum. We are now back to

the point we were at on June 11, 2003, only sixteen (16) months later. Had the Court not allowed the FLSA claims at that time, as it made the announcement off the record, it would have been necessary for Defendant to pursue the permissive appeal motion. Because of what the Court said, it became moot and the claims could be advanced.

Defendant's Motion for Permissive Appeal concerned Defendant's statutory right to assert Ada County's violations of FLSA in this action as a Counterclaim. Allowing Defendant to simply amend her Counterclaim, without asserting causes of actions pursuant to FLSA, would have no productive effect, as the issue for permissive appeal was the right to assert FLSA statutory rights as a claim in this dispute. The appeal issue would become moot only if the Court reversed its decision on the right to assert FLSA claims, and grant the amended counterclaim. It was deemed moot by the Court's announcement our FLSA claims could be asserted.

On June 11, 2004, this Court entered an Order "Withdrawing Order Denying Motion for Reconsideration and Order", and ruling that "counterclaimant may file an amended counterclaim pursuant to Rule 15, I.R.C.P. as a matter of right because no responsive pleading to the original counterclaim has been filed". The Court later entered a Supplemental Order, dated January 1, 2005, and stated, "On 6/11/03 the court ruled that the counterclaimant has a right to file an amended counterclaim because the plaintiff had not filed a reply to the original counterclaim".

CASE AUTHORITY AND ARGUMENT

Permissive Appeal

Appendix 17

The Idaho Supreme Court stated in Kindred v. Amalgamated Sugar Co., 118 Idaho 147, 794 P.2d 309 (1990):

> "Under I.A.R. 12, a party may seek permission to appeal from an interlocutory order which is not otherwise appealable as a matter of right under I.A.R. 11 (d). Generally, an appeal under I.A.R. 12 will be permitted when the order involves a controlling question of law as to which there is substantial grounds for difference of opinion and that an immediate appeal may materially advance the orderly resolution of the litigation. *Budell v. Todd*, 105 Idaho 2, 665 P.2d 701 (1983)."

Defendant does contend the subject matter does involve a controlling question of law, and the current District Court has precluded Defendant, contrary to existing Federal case law, from properly defending and advancing her cause of action as provided for in her Second Amended Counterclaim and subsequent pleadings to be processed in the Court.

Defendant's Federal Statutory "Right of Action"

Pursuant to 29 U.S.C. § 216 (b)

Congress adopted the *Fair Labor Standards Act*, 29 U.S.C. § 201 *et seq.* in 1938, as remedial legislation to address employment disputes over wages, pay, salaries, discriminatory, retaliatory and capricious terminations resulting from wage and record-keeping disputes over hours worked, payment of wage, and employees' remedies. The courts have consistently determined any attempt to impose restrictive interpretation of the *Act* is contrary to that congressional intent. See Lamon v.

City of Shawnee, Kan., 754 F.Supp. 1518 (D.Kan 1991). All employment subject to the *Fair Labor Standards Act* must be construed to include all rights and all terms of the Act. See Manseau v United States, 52 F Supp 395(DC Mich., 1943); Walling v McKay, 70 F Supp 160 (DC Neb., 1946), affd (CA8 Neb) 164 F2d 40; Orminski v Hyland Electrical Supply Co., 326 Ill App 392, 62 NE2d 14 (1945). No party can attempt to limit the scope of the *Fair Labor Standards Act*. See Kappler v Republic Pictures Corp., 59 F Supp 112 (DC Iowa, 1945), affd (CA8 Iowa) 151 F2d 543, 162 ALR 228, affd 327 US 757, 90 L Ed 991, 66 S Ct 523, reh den 327 US 817, 90 L Ed 1040, 66 S Ct 804. The Federal courts protect the employee against abuse of process that could affect any of the rights and duration of employment.

An employee is protected under the *Act* even when he or she communicates a failure to perform a mandatory duty (accurate record-keeping). The employee is protected at all times, under § 215 (a)(3) of the *Act*, and the employer will be in violation of the *Act* if any adverse action is taken against the employee, over wage underpayments and overpayments caused from inadequate record-keeping procedures, as that would result in discriminatory misconduct. In short, an employee who "complains" to their employer about violations of FLSA, such as administrative errors from improper, incorrect or inaccurate wage and salary record-keeping, is protected also from discriminatory and retaliatory punishment, or termination (FLSA § 215 (a)(3)). Ms. Gibson complained about the errors during her early tenure with Ada County, and ultimately decided to live with their errors, only thereafter to become the subject of discipline from these ongoing administrative errors. They fired her over the County's excessive wage deposits to a joint account, and foolishly said it was her fault for not catching it, being aware of it or reacting to it, despite the fact

Appendix 17

Ada County alone controls payroll, records, deposits and debits to any direct deposit account with any employee; that they generated their own pay voucher form, put their own figures on it, even described a base salary of $1,550.00 (should have been (1,575.00), and exercised total autonomy over payroll matters.

In Hageman v. Park West Gardens, 480 N.W.2d 223 (N.D. 1992, Brennan v. Maxey's Yamaha, Inc., 513 F.2d 179, 180 (8th Cir. 1975), the North Dakota Supreme Court made the relevant comment:

> "The Fair Labor Standards Act "prohibits discrimination against an employee who asserts or threatens to assert his or her FLSA rights."
>
> "Where the immediate cause or motivating factor of a discharge is the employee's assertion of statutory rights, the discharge is discriminatory under [29 U.S.C.] § 215 (a)(3) whether or not other grounds for discharge exist. Goldberg v. Bama Manufacturing Corp., 302 F.2d 152 (5th Cir. 1962); Mitchell v. Goodyear Tire & Rubber Co., 278 F.2d 562 (8th Cir. 1960)."

The North Dakota Supreme Court further stated: "Thus, where an employee is fired and the termination is motivated in any part by the employee's assertion of rights under the Act, such termination is deemed discriminatory." See also Martin v. Gingerbread House, Inc., 977 F.2d 1405, 1408 N. 4 (10th Cir. 1992) and Love v. RE/MAX of America, Inc., 738 F.2d 383, 387 (10th Cir. 1984).

Appendix 17

FLSA is deliberate and specific, and requires the employer to keep accurate records showing whether the employer (Ada County) is being compliant with FLSA, and this record-keeping activity is a means to a legitimate end, since these records are *quasi*-public in character. In one of the earliest cases involving FLSA record-keeping, Walling v. De Soto Creamery & Produce Co., 51 F. Supp. 938 (DC Minn. 1943), the court made the following conclusion of law:

> "By failing to keep true records of the hours worked each work day and each workweek by each of its employees, and by making or causing to be made arbitrary, fictitious and false entries, purporting to reflect the hours worked each day and each workweek by each of its employees, the regular rate of pay, the regular straight time earnings, and the additional overtime earnings of many of its employees as above stated, the defendant has violated the provisions of Sections 11 (c) and 15 (a)(5) of the Act."

When Ms. Gibson denied the contentions of misconduct alleged by Sheriff's agents, on July 20, 1999 (during two (2) interrogations), and thereafter on two (2) more occasions, August 6, 1999 and September 27, 1999, Ms. Gibson asserted her rights over these administrative errors, told them where the fault lies, and the action taken from her complaints about the overpayments and record-keeping errors was threats to her employment. The Ada County personnel created and perpetuated the administrative error (incorrect and inaccurate FLSA record-keeping), and that was the only basis for the retaliation, for the threat of prosecution, for the threat of discipline, and for the her termination. Ms. Gibson had no

participation or involvement in any of the County's mandatory FLSA record-keeping process; she was not aware of the error, was not a participant in the disbursement of wages, and never withdrew funds from the account, to even suggest any knowledge of the County's error. The County had the exclusive right to debit the account at any time, by the terms of the voluntary direct deposit pay program.

There was never any basis for a "criminal investigation" of Ms. Gibson, as she had no say in the mandatory record-keeping duties and obligations of FLSA. The County ascertained their own administrative errors on July 19, 1999, and they interrogated Ms. Gibson, whereby she expressed her attitude over their errors, their abuse of her rights, and she voiced her concerns, and asserted her employment rights and the statutory protections provided her by the terms of FLSA. All action taken by the County on July 19, 1999, and all times thereafter, was retaliatory action over these FLSA violations, and is addressed by Lambert v. Ackerley, 180 F.3d 997 at 1007-1008 (9th Cir. 1998), E.E.O.C. v. Romeo Community Schools, 976 F.2d 985 at 989 (6th Cir. 1992), Hageman v. Park West Gardens, Brennan v. Maxey's Yamaha, Inc., *supra*, and Walling v. De Soto Creamery & Produce Co., *supra*.

Defendant is Entitled to Bring *Fair Labor Standards Act* Claims for Employment Reinstatement, Recovery of Wages Owed, Liquidated Damages, Costs and Attorney Fees

This issue came on for hearing before the Court on January 23, 2003. The Court stated:

> "I had also previously ruled that the Fair Labor Standards Act is not applicable in this case, and

> to the extent that there was any question about allowing the plaintiff in Gibson versus Ada County from arguing, or amending her complaint to add a claim alleging that the Fair Labor Standards Act applies, that particular motion is denied. Okay?
>
> "The court will not allow the defendant, or rather Ms. Gibson, to amend her complaint to allege a violation of the Fair Labor Standards Act based on the facts of this controversy, based on the court's previous ruling that the Fair Labor Standards Act does not apply." (T., p. 20, L 25-p. 21, L 13).

Now, in its September 16, 2004 Order, this Court again stated Gibson is not entitled to bring Fair Labor Standards Act claims against Ada County. Neither in the January 23, 2003 hearing, nor now in its September 16, 2004 Order, has this Court offered any case law to support its contention that Ms. Gibson is not entitled to bring an action pursuant to FLSA. Defendant has a Federal statutory right of action, to be initiated in state or federal court, for recovery against Ada County for wages that are due and owing and for other FLSA violations.

Title 29 U.S.C. § 216 (b) states as follows:

> "Damages; **right of action**; **attorney's fees** and **costs**; termination of right of action:
>
> Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or

their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Any employer who violates the provisions of section 215(a)(3) of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of
section 215(a)(3) of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages. An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 217 of this title in which (1) restraint is sought of any further delay in the payment of

> unpaid minimum wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 206 or section 207 of this title by an employer liable therefor under the provisions of this subsection or (2) legal or equitable relief is sought as a result of alleged violations of section 215(a)(3) of this title". (Emphasis added).

Those first words of 29 U.S.C. § 216 (b) – "**right of action**", confer a Federal statutory right upon an individual to initiate, in a state or federal court (complaint or counterclaim), a cause of action against an employer, including a public agency, for wages the employer has failed to pay and are due the employee, under either § 206 or § 207 of the *Act*. No person, including a judicial officer of this State, has a right to interfere, obstruct or deny that Federal statutory right conferred to any individual, at any time. See Breuer v. Jim's Concrete of Brevard, Inc., 538 U.S. 691 (2003).

When any person, including the judicial officer of any state or federal court, denies a constitutional or a statutory right, that denial constitutes a civil rights violation under Title 42 § 1983.

Pursuant to 29 U.S.C. § 216 (b), the only time a situation exists, as a matter of law, where the "right of action" of an individual can be denied or terminated, is when there is a "filing of a complaint by the Secretary of Labor in an action under section 217 of this title". When the Secretary, U.S. Department of Labor, has intervened in behalf of an individual in an FLSA action, that Federal pursuit preempts the individual's pursuit of their own claim. Until that occurs, no person, entity, state agency, governmental subdivision, municipality or court of law (state or federal), is statutory

authorized to obstruct, deny, or interfere with any individual's statutory "right of action" to pursue a claim for unpaid wages, under § 206 or § 207 of the *Act*. The Secretary of U.S. Department of Labor has not yet decided to intervene in this dispute, though an investigation may be in progress. This Defendant has a statutory right under 29 U.S.C. § 216 (b), to pursue her "right of action" against Ada County, as announced in her Second Amended Counterclaim, and without obstruction, denial or interference by this Court. See Mitchell v. DeMario Jewelry, 361 U.S. 288 (1960).

Ada County has violated § 206 and § 207 repeatedly when they failed to provide Defendant the wages owed her, and when they failed to perform the mandatory record-keeping acts of 29 U.S.C. § 211 (c), and Defendant's claim is described and alleged in her Second Amended Counterclaim. When Ada County failed to provide Defendant those wages, 29 U.S.C. § 216 (b) conferred a Federal statutory "right of action", to enlist the aid of any federal or state court with proper venue, to recover those wages to her.

29 U.S.C. § 216 (b) also confers a Federal statutory "right of action" to engage a judicial proceeding for legal or equitable relief appropriate to effectuate the purposes of § 215 (a)(3) of the *Act*, including without limitation, employment, reinstatement, promotion, and the payment of wages, liquidated damages, and attorney fees. Defendant alleges Ada County violated § 215 (a)(3) and § 215 (a)(4), when they failed to produce and maintain accurate records mandated by § 211 (c) of the *Act*, when they discriminated against her, retaliated against her, and terminated her protected and classified employment. Because Ada County discriminated and wrongfully discharged her from her employment, 29 U.S.C. § 216 (b) conferred a Federal statutory "right of action", and a

cause of action to enlist the aid of such a federal or state court to recover those wages and secure those remedies, as addressed in her Second Amended Counterclaim.

ASSERTION OF COVERAGE

> Pub.L. 99-150, Sec. 8, Nov. 13, 1985, 99 Stat. 791, provided that: "A public agency which is a State, political subdivision of a State, or an interstate governmental agency and which discriminates or has discriminated against an employee with respect to the employee's wages or other terms or conditions of employment because on or after February 19, 1985, the employee asserted coverage under section 7 of the Fair Labor Standards Act of 1938 (29 U.S.C. § 207) shall be held to have violated section 15(a)(3) of such Act (29 U.S.C. § 215(a)(3)). The protection against discrimination afforded by the preceding sentence shall be available after August 1, 1986, only for an employee who takes an action described in section 15(a)(3) of such Act."

See 73 Am Jur 25, Second Edition, § 430-§ 434, Statutory Rights and Remedies.

After Congress enacted FLSA, the U.S. District Courts recognized the right of an individual to not only maintain an FLSA action, but the right to prosecute it to final judgment. In Apple v. Shulman Publications, 65 F.Supp. 677 (U.S.D.C. NJ 1943), the court affirmatively stated:

Appendix 17

> "The provisions of the Fair Labor Standards Act of 1938 are comprehensive; they define minimum labor standards and establish adequate remedies for their enforcement. When the Act is read and considered in its entirety, it seems reasonably clear that these remedies are exclusive and are not subject to exception. Section 216(b) of the Act grants to the aggrieved employee a right to maintain an action for unpaid minimum wages and overtime compensation "in any court of competent jurisdiction. This right to "maintain" the action includes not only the right to initiate it but the right to prosecute it to final judgment. Any other construction would nullify the statutory provision and defeat the right therein reserved to the employee".

In addition to a statutory right to pursue a "right of action" against Ada County, Defendant Gibson also has a right to a trial by jury, and a right to a final judgment against Ada County, as a matter of law, and this State Court may not interfere, obstruct or deny those rights. See Monterey v. Del Monte Dunes at Monterey, LTD., 526 U.S. 687, 707-708 (1999), Lorillard v. Pons, 434 U.S. 575, 580 (1978); and Lewis v. Times Pub. Co., 185 F.2d 457 (5th Cir. 1950). See also Brooklyn Bank v. O'Neil, 324 U.S. 697 (1945).

At no time can an individual be denied by anyone (including the employer, another employee, a prosecuting attorney, a judge) their statutory right to initiate a claim for unpaid wages that are due them from an FLSA employer. An individual is statutorily authorized, without need for any permission from any court, to initiate a private action against

an employer under FLSA, without intrusion from a court of law.

> "The standard for reviewing a dismissal for failure to state a cause of action pursuant to I.R.C.P. 12(b)(6) is the same as the standard for reviewing a grant of summary judgment. *Coghlan v. Beta Theta Pi Fraternity,* 133 Idaho 388, 398, 987 P.2d 300, 310 (1999); *Rim View Trout Co. v. Dep't. of Water Resources,* 119 Idaho 676, 677, 809 P.2d 1155, 1156 (1991). The grant of a Rule 12(b)(6) motion will be affirmed where there are no genuine issues of material fact and the case can be decided as a matter of law. *Coghlan,* 133 Idaho at 398, 987 P.2d at 310; *Eliopulos v. Idaho State Bank,* 129 Idaho 104, 107-08, 922 P.2d 401, 404-05 (Ct.App. 1996). When reviewing an order of the district court dismissing a case pursuant to Rule 12(b)(6), the nonmoving party is entitled to have all inferences from the record and pleadings viewed in its favor, and only then may the question be asked whether a claim for relief has been stated. *Coghlan,* 133 Idaho at 398, 987 P.2d at 310. The issue is not whether the plaintiff will ultimately prevail, but whether the party is entitled to offer evidence to support the claims. *Orthman v. Idaho Power Co.,* 126 Idaho 960, 962, 895 P.2d 561, 563 (1995)".

See Cunningham v. Jensen, Idaho Court of Appeals, Docket No. 29770 (App. 2004).

Appendix 17

Gibson's Claims are Not Barred by Idaho Tort Law

In Defendant's Title 42 case previously before this District Court Judge (Case No. CV OC 0205601D), and now on appeal before the Idaho Supreme Court (Docket No. 29694), the same position was taken of a notice prerequisite was raised by Ada County, and accepted by this Court, suggesting Ms. Gibson was required to file a timely notice of her claim under the *Idaho Tort Claims Act*, Idaho Code, § 6-906. This Court decided in the Title 42 case that she had not complied with § 6-906, causing her claims to be barred.

Case authority tells us such an argument made in the Title 42 case, as well as the argument being presented here in this case, is also without merit. There are no procedural barriers, such as a timely notice of claims under a state tort statute that are intended, or allowed, when an individual pursues a Federal statutory right for enforcement of a claim under a Federal enactment.

The case of Felder v. Casey, 487 U.S. 131 (1988), involving a Title 42 § 1983 claim, expressed the issue over a state's notice-of-claim tort statute. The question brought before the U.S. Supreme Court was essentially one of pre-emption. In that case, the issue was whether the application of the State's (Wisconsin) notice-of-claim provision to § 1983 action brought in state court was consistent with the goals of the federal civil rights laws, allowing such a requirement to become an obstacle to the accomplishment and execution of the full purpose and objective of Congress.

Specifically, the Court stated at page 131:

Appendix 17

> "Because the Wisconsin notice-of-claim statute conflicts in both its purpose and effects with § 1983's remedial objectives, and because its enforcement in state-court actions will frequently and predictably produce different outcomes in § 1983 litigation based solely on whether the claim is asserted in state or federal court, it is pre-empted
> pursuant to the Supremacy Clause when the § 1983 action is brought in a state court. Pp. 138-153".

The *Felder* Court further stated on page 141:

> "...the application of the notice requirement burdens the exercise of the federal right by forcing civil rights victims who seek redress in state courts to comply with a requirement that is entirely absent from civil rights litigation in federal courts. This burden, as we explain below, is inconsistent in both design and effect with the compensatory aims of the federal civil rights laws. Second, it reveals that the enforcement of such statutes in § 1983 actions brought in state court will frequently and predictably produce different outcomes in federal civil rights litigation based solely on whether that litigation takes place in state or federal court. States may not apply such an outcome-determinative law when entertaining substantive federal rights in their courts", and pages 143-145,

Appendix 17

"The decision to subject state subdivisions to liability for violations of federal rights, however, was a choice that Congress, not the Wisconsin Legislature, made, and it is a decision that the State has no authority to override. Thus, however understandable or laudable the State's interest in controlling liability expenses might otherwise be, it is patently incompatible with the compensatory goals of the federal legislation, as are the means the State has chosen to effectuate it".

"This incompatibility is revealed by the design of the notice-of-claim statute itself, which operates as a condition precedent to recovery in all actions brought in state court against governmental entities or officers. *Sambs* v. *Nowak,* 47 Wis.2d 158, 167, 177 N.W.2d 144, 149 (1970). "Congress," we have previously noted, "surely did not intend to assign to state courts and legislatures a conclusive role in the formative function of defining and characterizing the essential elements of a federal cause of action." *Wilson,* 471 U.S., at 269. Yet that is precisely the consequence of what Wisconsin has done here: although a party bringing suit against a local governmental unit need not allege compliance with the notice statute as part of his or her complaint, *Nielsen, supra,* at 580, 334 N.W.2d, at 245, the statute confers on governmental defendants an affirmative defense that obligates the plaintiff to demonstrate compliance with the notice requirement before he or she may recover at all,

Appendix 17

a showing altogether unnecessary when such an action is brought in federal court. States, however, may no more condition the federal right to recover for violations of civil rights than bar that right altogether, particularly where those conditions grow out of a waiver of immunity which, however necessary to the assertion of state-created rights against local governments, is entirely irrelevant insofar as the assertion of the federal right is concerned, see *Martinez,* 444 U.S., at 284, and where the purpose and effect of those conditions, when applied in § 1983 actio[illegible] is to control the expense associated with the very litigation Congress has authorized".

"This burdening of a federal right, moreover, is not the natural or permissible consequence of an otherwise neutral, uniformly applicable state rule. Although it is true that the notice-of-claim statute does not discriminate between state and federal causes of action against local governments, the fact remains that the law's protection extends only to governmental defendants and thus conditions the right to bring suit against the very persons and entities Congress intended to subject to liability. We therefore cannot accept the suggestion that this requirement is simply part of "the vast body of procedural rules, rooted in policies unrelated to the definition of any particular substantive cause of action, that forms no essential part of `the cause of action' as applied to any given plaintiff." Brief for International City

Management Association et al. as *Amici Curiae* 22 (Brief for *Amici Curiae*). On the contrary, the notice-of-claim provision is imposed only upon a specific class of plaintiffs — those who sue governmental defendants — and, as we have seen, is firmly rooted in policies very much related to, and to a large extent directly contrary to, the substantive cause of action provided those plaintiffs. This defendant-specific focus of the notice requirement serves to distinguish it, rather starkly, from rules uniformly applicable to all suits, such as rules governing service of process or substitution of parties, which respondents cite as examples of procedural requirements that penalize noncompliance through dismissal. That state courts will hear the entire § 1983 cause of action once a plaintiff complies with the notice-of-claim statute, therefore, in no way alters the fact that the statute discriminates against the precise type of claim Congress has created", and pages 145-148,

"In *Wilson,* we held that, for purposes of choosing a limitations period for § 1983 actions, federal courts must apply the state statute of limitations governing personal injury claims because it is highly unlikely that States would ever fix the limitations period applicable to such claims in a manner that would discriminate against the federal right. Here, the notice-of-claim provision most emphatically does discriminate in a manner detrimental to the federal right: only those persons who wish to

sue governmental defendants are required to provide notice within such an abbreviated time period".

"Finally, the notice provision imposes an exhaustion requirement on persons who choose to assert their federal right in state courts, inasmuch as the § 1983 plaintiff must provide the requisite notice of injury within 120 days of the civil rights violation, then wait an additional 120 days while the governmental defendant investigates the claim and attempts to settle it. In *Patsy* v. *Board of Regents of Florida,* 457 U.S. 496 (1982), we held that plaintiffs need not exhaust state administrative remedies before instituting § 1983 suits in federal court. The Wisconsin Supreme Court, however, deemed that decision inapplicable to this state-court suit on the theory that States retain the authority to prescribe the rules and procedures governing suits in their courts. 139 Wis.2d, at 623, 408 N.W.2d, at 23. As we have just explained, however, that authority does not extend so far as to permit States to place conditions on the vindication of a federal right. Moreover, as we noted in *Patsy,* Congress enacted § 1983 in response to the widespread deprivations of civil rights in the Southern States and the inability or unwillingness of authorities in those States to protect those rights or punish wrongdoers. *Patsy, supra,* at 503-505; see also *Wilson* v. *Garcia,* 471 U.S., at 276-277, 279. Although it is true that the principal remedy Congress chose to provide injured persons was immediate

access to *federal* courts, *Patsy, supra,* at 503-504, it did not leave the protection of such rights exclusively in the hands of the federal judiciary, and instead conferred concurrent jurisdiction on state courts as well. 457 U.S., at 506-507. Given the evil at which the federal civil rights legislation was aimed, there is simply no reason to suppose that Congress meant "to provide these individuals immediate access to the federal courts notwithstanding any provision of state law to the contrary," *id.,* at 504, yet contemplated that those who sought to vindicate their federal rights in state courts could be required to seek redress in the first instance from the very state officials whose hostility to those rights precipitated their injuries."

"Respondents nevertheless argue that any exhaustion requirement imposed by the notice-of-claim statute is essentially *de minimis* because the statutory settlement period entails none of the additional expense or undue delay typically associated with administrative remedies, and indeed does not alter a claimant's right to seek full compensation through suit. This argument fails for two reasons. First, it ignores our prior assessment of "the dominant characteristic of civil rights actions: *they belong in court.*" *Burnett,* 468 U.S., at 50 (emphasis added). "These causes of action," we have explained, "exist independent of any other legal or administrative relief that may be available as a matter of federal or state law. They are judicially enforceable *in the first instance.*" *Ibid.*

(emphasis added). The dominant characteristic of a § 1983 action, of course, does not vary depending upon whether it is litigated in state or federal court, and States therefore may not adulterate or dilute the predominant feature of the federal right by imposing mandatory settlement periods, no matter how reasonable the administrative waiting period or the interests it is designed to serve may appear".

In conclusion, the Felder Court wrote, at page153:

"In enacting § 1983, Congress entitled those deprived of their civil rights to recover full compensation from the governmental officials responsible for those deprivations. A state law that conditions that right of recovery upon compliance with a rule designed to minimize governmental liability, and that directs injured persons to seek redress in the first instance from the very targets of the federal legislation, is inconsistent in both purpose and effect with the remedial objectives of the federal civil rights law. Principles of federalism, as well as the Supremacy Clause, dictate that such a state law must give way to vindication of the federal right when that right is asserted in state court".

See also Wilson v. Garcia, 471 U.S. 261, (1985) and Henderson v. State, 110 Idaho 308, 311, 715 P.2d 978 (1986). Since the *Felder* decision was issued in 1988, various other courts have cited the same result as the U.S. Supreme Court determined in *Felder*. Those cases are Palazzolo v. Rhode

Island, 533, U.S. 606, 626 (2001); Rumbles v. Hill, 182 F.3d 1064, 1069 9th Cir. 1999); Silva v. Crain, 169 f.3d 608, 610 (9th Cir. 1999); and Ellis v. City of San Diego, 176 F.3d 1183, 1191 (9th Cir. 1999). See also Kimes v. Stone, 84 F.3d 1121, 1127 (9th Cir. 1996).

Prior to the U.S. Supreme Court's decision in *Felder* (1988) our Idaho Supreme Court recognized (1982) that a notice-of claim requirement pursuant to the *Idaho Tort Claims Act*, are inapplicable to a cause of action brought under a Federal enactment. See Overman v. Klein, 103 Idaho 795, 798-799, 654 P.2d 888 (1982), and in the case of Sweitzer v. Dean, 118 Idaho 568, 798 P.2d 27 (1990), our Supreme Court clearly stated:

> "A state's notice-of-claim statute which provides that no action may be brought or maintained against a state government subdivision unless claimant provides written notice within a certain period of time is preempted when a federal civil rights action is brought in state court".

When an individual, such as Defendant, pursues a statutory right for the enforcement of a claim under a Federal enactment, unless otherwise specifically provided for in the Federal enactment, no state exhaustion of remedies or other notice-of-claim requirements exist. Those state notice-of-claim requirements are preempted by Federal law. In Ms. Gibson's Title 42 action, and now in her action brought pursuant to the *Fair Labor Standards Act*, she was not required to give any notice of her claim to anyone, especially Ada County. The controlling and only statute of limitations for an FLSA action, is found in 29 U.S.C. § 255. Ada County is prohibited from

frivolously suggesting the notice-of-claim requirement found in the *Idaho Tort Claims Act* is a mandatory procedure that must be used prior to presenting an FLSA claim, and failure to do so bars any right of action under FLSA. This argument by Ada County is contrary to law, without any legal foundation, and is bad faith, in that they know it is contrary to existing law and both Federal and State case authority.

In Heder v. City of Two River, Case No. 00-C-0274, 149 F. Supp.2d 677 (E.D. Wis 2001), and citing *Felder* as a foundational case, the Federal District Court analyzed the Applicability of a State Notice-of-Claim Statute to a Federal FLSA Claim. The Court stated:

> "Defendant contends that plaintiff's FLSA claim is barred because he did not file a timely notice of claim pursuant to Wis. Stat. § 893.80. This statute provides that no action may be brought against a governmental subdivision, such as a municipality, unless a claimant files a written claim within 120 days of the event giving rise to the claim. Wis. Stat. Ann. § 893.80(1)(b) (West Supp. 2000). Plaintiff filed his notice of claim in September 1999, long after the 120-day notice of claim period for any claims arising from 1997. Defendant accordingly contends that any such claims are barred.
>
> However, state procedural rules may not be used to defeat a federal right. Brown v. W. Ry. Co. of Ala., 338 U.S. 294, 296 (1949). In Felder v. Casey, 487 U.S. 131 (1988), the Supreme Court squarely held that non-compliance with the very statute at issue here, § 893.80. did not

> bar claims brought under federal law. Felder governs the present case. Congress enacted the FLSA to promote and maintain a standard of living necessary for workers' health, efficiency, and general well-being, 29 U.S.C. § 202(a), and granted workers a two-year statute of limitations (three years for willful violations), 29 U.S.C. § 255(a). Non-compliance with a state notice of claim statute does not bar FLSA claims against governmental subdivisions (or, at any rate, against municipal corporations or other governmental entities which are not arms of a state, Alden v. Maine, 527 U.S. 706, 756 (1999)). See also Mitchell v. La Barge, 684 N.Y.S.2d 10, 11 (App. Div. 1999) (holding that, under Felder, FLSA claim against municipality was not barred by New York State notice of claim statute)".

The decision of this Federal Court is directly on point as to this argument. Ms. Gibson is not required, pursuant to the *Idaho Tort Claims Act*, to ever give any notice-of-claim to Ada County prior to submitting her claim to recover monies or allege rightful offsets and credits for wages owed to her due to her employment with the Ada County Sheriff's Office. Any such suggestion is austerely contrary to law. See also Travis v. Knappenberger, Case No. CV-00-393-HU, ___ F.Supp. ___ (Or. 2000 Conner v. Schnuck Markets, Inc., 906 F.Supp. 606, 611 (Kan. 1995); Hayes v. McIntosh, 604 F.Supp. 10, 17-18 (Ind. 1984); and particularly Bar rentine v. Arkansas – Best Freight System, 450 U.S. 728, 740 (1981).

Appendix 17

Denial of Procedural Due Process

The Ada County Personnel System (Merit System), Ada County Code (A.C.C.), § 1-7-1 through § 1-7L-10, conferred upon Defendant, an Ada County employee, a legitimate entitlement or benefit to a property right in her employment and wages owed to her. Once Defendant attained that tenured or classified employment status with Ada County, in accordance with the Ada County Code, Defendant then had the unqualified right to an expectation in continued employment and compensation for wages owed to her, and thus an unqualified right to procedural due process concerning those property rights. Ada County and this Court have taken the obtuse position that has severely restricted, obstructed, deprived and eliminated Defendant's right to control her employment benefits, and that conduct has deprived Defendant of procedural due process, as a matter of law. See Pappas v. City of Lebanon, Civil Action No. 1:03-CV-1112, August 16, 2004 (M.D. Pa. 2004).

CONCLUSION

Defendant does believe the current state of the issues presented as a result of the September 16, 2004 order is of a significant and substantial legal concern, of great public interest, and involve a controlling question of law on the issues of employee statutory rights, privileges, protections, benefits and what is expected of an FLSA employer who remains knowingly out-of-compliance of the mandatory law, in violation of the Federal enactment and of its own County Code requirements, and then disregards its own administrative errors caused from the record-keeping violations, and disregards the pay reduction provision mandated in its own County Personnel System, and then discriminates against a loyal – never once

disciplined – employee, by the discriminatory, retaliatory, arbitrary and capricious termination of such a dedicated employee, because of the voiced attitude over the County's pay voucher errors. We are confronted with an employer who believes it is above the law and can conduct this course of conduct with impunity.

Ada County's failure to correctly cite applicable law is disturbing; it is deliberate, not just a reckless indifference to the truth. Consequently, this Court's September 16, 2004 Order does present a significant and substantial legal concern, of great public interest, and involves controlling questions of law, not only decided differently, as required by Federal law, but specifically affects issues of employee rights, privileges, protections, and Federal statutory rights of an employee, and illustrates what takes place when an FLSA employer remains knowingly out-of-compliance to mandatory law, in violation of Federal enactments and its own County Code requirements. Ada County disregards its own administrative errors caused by its record-keeping violations; it disregards the pay reduction provision mandated in its own County Personnel System, and it disregards (and argues against) the requirements of Federal law. This employer acts as though it is above the law and can conduct its course of conduct with impunity. Defendant respectfully requests the Court to enter an Order restoring the judicial means by which Defendant's may pursue her Federal statutory right, as announced within 29 U.S.C. § 216 (b), and as determined and demonstrated by case authority to this Court.

Defendant respectfully requests the Court to enter an Order approving her Motion to Appeal by Permission and seek determination from the Appellate Court concerning Defendant's due process of law, and her statutory rights to

initiate and pursue her causes of action against Ada County, due to their offensive and unlawful ongoing violations of the *Fair Labor Standards Act*, 29 U.S.C. § 201 *et seq.*

Dated This 9th day of December 2004.

s/ Vernon K. Smith
Vernon K. Smith
Attorney for Defendant/Counterclaimant

APPENDIX 18 – [GIBSON] MOTION FOR PERMISSION TO APPEAL FROM DISTRICT COURT'S INTERLOCUTORY ORDER ENTERED SEPTEMBER 16, 2004 BY JUDGE RONALD J. WILPER, FOURTH DISTRICT COURT (DOCKET NO. 31553), FILED DECEMBER 9, 2004

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

Case No. CV OC 0107394D

MOTION FOR PERMISSION TO APPEAL FROM DISTRICT COURT'S INTERLOCUTORY ORDER ENTERED SEPTEMBER 16, 2004

Filed: December 9, 2004

ADA COUNTY,

Plaintiff/Counterdefendant,

v.

STACY A. GIBSON

Defendant/Counterclaimant.

COMES NOW The Defendant/Counterclaimant above-named, through counsel, Vernon K. Smith, and pursuant to Rule 12, I.A.R., does request this Court to enter an order granting Ms. Gibson permission to appeal the District Court's Interlocutory Order entered September 16, 2004, to the Idaho Supreme Court, as it appears appropriate upon the following controlling questions of law:

Appendix 18

1. Whether Ms. Gibson has a Federal statutory right under the *Fair Labor Standards Act* (FLSA), 29 U.S.C. § 216 (b), to initiate and assert her claims for relief against her employer, Ada County, as addressed in her Second Amended Counterclaim, and to pursue her right to recover back pay due for regular wages, overtime wages, and employment entitlements and benefits, in accordance with her protected status as a permanent and classified Ada County employee, which specifically includes her rights to sick leave, vacation pay, additional holiday pay, additional overtime pay, step increases, cost of living increases, continued medical insurance benefits, continued family coverage benefits, continued life and disability insurance, Workman's Compensation coverage, all retirement benefit funds for PERSI (representing 6% of total monthly wages) and PEBSCO (an employee contributory retirement plan), together with available training benefits, and recovery of all other benefits as a result of the inadequate wage and record-keeping procedures that caused the administrative error and overpayment of her wages into a joint checking account under the direct deposit system used by Ada County, through its Payroll Department, resulting in Ms. Gibson's mistaken receipt of funds from the County's negligence and ongoing violations of the FLSA provisions announced in 29 U.S.C. § 201 *et seq.* It was these erroneous overpayment of wages to that account, without her knowledge, that has resulted in actions taken by the Ada County Sheriff, Vaughn Killeen, to initiate malicious and capricious interrogations, threats of termination, violations of her Merit System protection and property rights, and causing Ms. Gibson to suffer a psychological workplace injury, and then, in a retaliatory and discriminatory manner, and contrary to Federal law (FLSA), Sheriff Killeen did then terminate her employment with Ada County, which has denied all efforts at exhausting any of her administrative due process remedies.

2. Whether Ms. Gibson has a Federal statutory right under the *Fair Labor Standards Act* (FLSA), 29 U.S.C. § 216 (b), to initiate and assert a claim for relief against her employer, Ada County, as addressed in her Second Amended Counterclaim, including the reinstatement of her Ada County employment, resulting from the discriminatory and retaliatory manner in which the Ada County Sheriff, Vaughn Killeen, terminated her employment with the Ada County Sheriff's Office, as a result of the inadequate and incorrect wage and record-keeping procedure that caused an administrative payroll error and overpayment of Defendant's salary into a joint checking account under the direct deposit system used by the County, resulting in Defendant's mistaken receipt of funds from the County's negligence and ongoing violations of the FLSA provisions announced in 29 U.S.C. § 201 *et seq*.

3. Whether Ms. Gibson has a Federal statutory right under the *Fair Labor Standards Act* (FLSA), 29 U.S.C. § 216 (b), to initiate and assert a claim for relief against her employer, Ada County, as addressed in her Second Amended Counterclaim, including recovery of liquidated damages equal to two (2) times the recovery of back pay and benefits as addressed in Paragraphs No. 1 & 2 above.

4. Whether Ms. Gibson has a Federal statutory right under the *Fair Labor Standards Act* (FLSA), 29 U.S.C. § 216 (b), to initiate and assert a claim for relief against her employer, Ada County, as addressed in her Second Amended Counterclaim, including recovery of costs and attorney fees associated with her litigation in this matter for the reinstatement of her employment, and recovery of back pay and benefits as addressed in Paragraphs No. 1 & 2 above.

5. Whether Ms. Gibson, as a prerequisite to initiating her Federal statutory right under the *Fair Labor Standards Act* (FLSA), 29 U.S.C. § 216 (b), is required to submit a "notice-of-claim" to Ada County pursuant to the *Idaho Tort Claims Act*, § 6-906, as a condition precedent to initiating this claim to enforce her federally established and protected statutory rights to unconditional relief as addressed in her Second Amended Counterclaim, and referenced in Paragraphs No. 1, 2, 3 & 4 above.

6. Whether the lower court obstructed and deprived Ms. Gibson the constitutional right to procedural due process concerning her employment property rights and the wages owed to her by Ada County, when the lower court denied access to judicial remedies concerning her Federal statutory "right of action" pursuant to the *Fair Labor Standards Act*, 29 U.S.C. § 201 *et seq*.

Ms. Gibson does contend the subject matter in this dispute does involve controlling questions of law, of great public interest, with a potential of affecting any one of the many employees of Ada County, and the action of this District Court to preclude this Defendant from properly asserting her "right of action", affirmative defenses and causes of action addressed in her Second Amended Counterclaim, is contrary to existing Federal and State case law.

Said Defendant does request this Court enter an order granting a permissive appeal, based upon the reasons, concerns and case authorities set forth in Defendant's Memorandum, submitted in support of this Motion, and filed contemporaneously herewith. Pursuant to Rule 12, I.A.R., Defendant requests expedited oral argument on this Motion.

Appendix 18

Dated This 9th day of December 2004.

s/ Vernon K. Smith
Vernon K. Smith
Attorney for Defendant/Counterclaimant

APPENDIX 19 – ORDER DENYING [GIBSON] MOTION TO DISMISS AND GRANTING [ADA COUNTY] MOTION TO DISMISS ENTERED BY JUDGE RONALD J. WILPER, FOURTH DISTRICT COURT (DOCKET NO. 31553), FILED SEPTEMBER 16, 2004

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

Case No. CV OC 0107394D

ORDER DENYING DEFENDANT'S MOTION TO DISMISS AND GRANTING PLAINTIFF'S MOTION TO DISMISS

Filed: September 16, 2004

ADA COUNTY,

Plaintiff,

v.

STACY A. GIBSON

Defendant.

On July 15, 2004, the Defendant in this action moved to dismiss Plaintiff Ada County's complaint based on a lack of subject matter jurisdiction as required by Idaho Rule of Civil Procedure 12(b)(1). On August 9, 2004, the Court heard oral arguments regarding the motion and took the matter under advisement. On February 23, 2004, the Plaintiff moved to dismiss Defendant Stacy Gibson's Second Amended Counterclaim based on the failure of Defendant to state a cause

of action upon which relief can be granted pursuant Idaho Rule of Civil Procedure 12(b)(6) and on the ground that other actions between these same parties are pending or have been litigated with respect to the counterclaim. The Court heard oral argument on this motion on May 24, 2004.

I. BACKGROUND

This action began as a claim by Ada County for return of overpaid compensation. Through her counterclaim, Gibson seeks to turn this into an action to recover under the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201 *et seq*.

Stacy Gibson was a records clerk for the Ada County Sheriff's Office. She eventually received permanent status and became a "classified employee." Once "classified," she could only be dismissed for cause. She then was promoted to Jail Technician II. Gibson was supposed to be paid about $1,500 per month. She actually received about $3000 per month for several months, amounting to $8500 in over compensation. Ada County seeks to recover that amount and Gibson counterclaims to offset that amount or otherwise she is owed other money.

Gibson contends she engaged in no wrongful conduct. Gibson also asserts various acts of wrongful conduct were committed by many Ada County employees and alleges violations of the FLSA.

II. ANALYSIS

A. DEFENDANTS MOTION TO DISMISS PLAINTIFF' CLAIM

Appendix 19

Gibson argues that the Court has no subject matter jurisdiction over this matter because Ada County must first exhaust administrative remedies before any judicial action can be taken. She argues that wage overpayment and the right to reimbursement resulting from wage overpayment are administrative actions that must first be ruled upon by an administrative agency.

Gibson's argument is without merit. Nowhere does the Ada County Code (A.C.C.) even address the situation presented in this case. § 1-7C-6 of the A.C.C. provides that an employee's pay may be reduced for reasons including overpayments made due to administrative error. However this section is permissive, not mandatory. Gibson has been fired and this action was initiated after she was terminated. There is no longer an employee-employer relationship. Ada County did not attempt to recover any overpayments until after Gibson was fired.

Gibson further argues that since there has been no final agency order, Ada County cannot proceed on its claim because the Idaho Administrative Procedures Act (IDAPA), Idaho Code § 67-5201 *et seq*, states that "[a] person is not entitled to judicial review of an agency action until that person has exhausted all administrative remedies required in this chapter." IDAPA §67-52719(1).

Gibson's argument fails because Ada County is not seeking judicial review of an agency decision. The agency decision was to terminate Gibson, not to collect any overpayments. This restitution action stems from her employment, but it is a simple common law action.

In addition, the decision regarding Gibson's termination is final. In Gibson v. Ada County Sheriff's Department, CV OC 0305850D, (2003), the Court found that there is no statutory "or constitutional authority under Idaho law that would allow the Board of County Commissioners to review the personnel decisions of other elected County officers." Thus, the Sheriff's decision to terminate Gibson is a final decision. It cannot be reviewed in the manner Gibson requests.

Therefore, the Court DENIES Defendant's Motion to Dismiss.

B. PLAINTIFF'S MOTION TO DISMISS DEFENDANT'S SECOND AMENDED COUNTERCLAIM

Ada County moves to dismiss Gibson's Second Amended Counterclaim based on the grounds that the Court previously barred Gibson from bringing FLSA claims and that Gibson's counterclaim fails to comply with the Idaho Tort Claims ACT (ITCA) § 6-901 *et seq.* Ada County argues that because Gibson did not file her claim within 180 days from the date on which it arose, the claim is barred pursuant to §6-906 and §6-908.

1. Gibson is Not Entitled to Bring Fair Labor Standards Act Claims

Gibson alleges fifteen (15) counts against Ada County in her Second Amended Counterclaim. Each of these counts alleges violations of the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201 *et seq.*

The Court has already ruled that Gibson cannot bring these claims. Even Gibson acknowledges that at a hearing on

January 23, 2003, the Court stated: "The Court will not allow the defendant, or rather Ms. Gibson, to amend her complaint to allege a violation of the Fair Labor Standards Act based on the facts of this controversy, based on the Court's previous ruling that the Fair Labor Standards Act does not apply."

On February 19, 2003, the Court entered an order denying Gibson the right to amend her counterclaim. On April 18, 2003, the Court entered an order denying Gibson's Motion to reconsider the February 19, 2003 order.

On May 2, 2003, Gibson filed a Motion for Permission to Appeal the District Court's Interlocutory Order of February 19, 2003. On June 11, 2003, the Court allowed Gibson to file an amended counterclaim as a matter of right because no answer had yet been filed as to her original claim, pursuant to IRCP 15. Gibson argues that the Court intended by it's ruling to allow her to resurrect the [FSLA] claims. Such was not the case. Therefore the Court finds that because all of Gibson's [FSLA] claims are invalid, Plaintiff's Motion to Dismiss with respect to those claims is GRANTED.

2. Gibson's Tort Claims are Barred by Idaho Law

All of Gibson's causes of action involved FLSA claims and FLSA relief. However, Gibson's counterclaims are vast and intertwined and can be construed to allege torts as well as FLSA violations. Ada County argues that Gibson's tort claims are barred under Idaho law because she did not timely file a notice of her claims. Idaho Code §6-902 defines a claim.

> "Claim" means any written demand to recover money damages from a governmental entity or its employee which any person is legally entitled to recover under

> this act as compensation for the negligent or otherwise wrongful act or omission or a governmental entity or its employee when action within the course or scope of his employment.

Idaho Code §6-906 states that:

> All claims against a political subdivision arising under the provisions of this act and all claims against an employee of a political subdivision for any act or omission of the employee within the course or scope of his employment shall be presented to and filed with the clerk or secretary of the political subdivision within one hundred eighty (180) days from the date the claim arose or reasonably should have been discovered, whichever is later.

Gibson's failure to file notice of her claims bars her cause of action, pursuant to Idaho Code, § 6-908, which states that "[no] claim or action shall be allowed against a governmental entity or its employee unless the claim has been presented and filed within the time limits prescribed by this act."

Therefore, the Court finds that with respect to Gibson's tort claims Plaintiff's Motion to Dismiss is GRANTED.

III. CONCLUSION

Based on the foregoing, the Court hereby DENIES Defendant's Motion to Dismiss Plaintiff's claim. Because all of Gibson's claims are barred by either statute or the Court's rulings, the Court hereby GRANTS Plaintiff's Motion to Dismiss Defendant's Second Amended Counterclaim.

Appendix 19

IT IS SO ORDERED.

DATED this 16th day of Sept., 2004.

s/ Ronald J. Wilper
Ronald J. Wilper
DISTRICT JUDGE

APPENDIX 20 – ORDER ON RENEWED MOTION FOR RECONSIDERATION AND FINAL ORDER DENYING PETITION FOR JUDICIAL REVIEW ENTERED BY JUDGE JOEL HORTON, FOURTH DISTRICT COURT (DOCKET NO. 30976), FILED JUNE 17, 2004

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

Case No. CV-OC-03-05850*D

ORDER ON RENEWED MOTION FOR RECONSIDERATION AND FINAL ORDER DENYING PETITION FOR JUDICIAL REVIEW

Filed: June 17, 2004

STACY A. GIBSON,

Petitioner,

v.

ADA COUNTY, a political subdivision and governmental agency of the State of Idaho AND THE ADA COUNTY SHERIFF'S OFFICE,

Respondents.

The history of the case requires more than a brief discussion to place this Court's Orders in context. Petitioner filed the instant "petition for judicial review" on July 30, 2003. Petitioner's motion for remand of the matter to the Ada County Commissioners for creation of a previously non-existing

agency record came before the Hon. D. Duff McKee for hearing on October 15, 2003. At the conclusion of the hearing, the motion was denied. The minutes reflect Judge McKee's conclusion that a petition for judicial review as an inappropriate mechanism to pursue Petitioner's claim. The minutes also suggest that Judge McKee denied leave to seek an interlocutory appeal of his ruling, although no written order to this effect was entered.

Rather than enter a final order, Judge McKee ruled that Petitioner should be able to amend the petition to state other grounds, arising out of the common law, upon which relief might be granted. Judge McKee directed counsel for Petitioner to prepare a draft order to be reviewed by Respondents' attorney.

Rather than preparing the order as directed, Petitioner requested that Judge McKee reconsider his previous ruling. That motion was denied by order dated February 27, 2004. On the same date, Judge McKee entered an interlocutory order drafted by the attorney for Respondents. That interlocutory order denied the petition for judicial review and granted Petitioner leave to amend the petition within thirty (30) days to state common-law grounds for relief.

Petitioner responded on March 12, 2004, with a motion for permissive appeal from the interlocutory order of February 27, 2004. On March 19, 2004, Petitioner filed an amended motion for permissive appeal. Judge McKee denied the motion for interlocutory appeal on April 8, 2004.

Some time between April 12, 2004 and April 22, 2004, the Hon. Darla Williamson, Administrative District Judge for the Fourth Judicial District, directed that this action be reassigned

to an active district judge. On April 22, 2004, this action was assigned to the undersigned district judge.

Prior to the order of reassignment, on March 29, 2004, Petitioner filed a motion to amend the petition to seek peremptory and alternative writs of mandamus. On May 14, 2004, Petitioner filed a renewed motion to reconsider the order denying the petition for judicial review.

The motion to amend the petition came before the Court for hearing on June 16, 2004. At that hearing, Petitioner's attorney reiterated the desire to pursue and appeal of Judge McKee's earlier order of February 27, 2004. The Court indicated that although the renewed motion for reconsideration of Judge McKee's the interlocutory order of February 27, 2004, was not before the Court for hearing, the motion would not be granted. In order to expedite the appeal from Judge McKee's decision, Petitioner withdrew her motion to amend the petition to state common law theories upon which relief might be granted.

Accordingly, for the foregoing reasons, Petitioner's renewed motion for reconsideration shall be, and hereby is, denied. Petitioner's motion to withdraw her motion to amend shall be and hereby is, granted that motion is withdrawn. As Petitioner does not seek to exercise the leave to amend granted by the interlocutory order of February 27, 2004, that order shall be, and hereby is, deemed to be a final order from which an appeal may be taken.

Appendix 20

IT IS SO ORDERED.

DATED this 16th day of June, 2004.

s/ Joel D. Horton
JOEL D. HORTON
District Judge

APPENDIX 21 – ORDER OF THE IDAHO SUPREME COURT, ERRONEOUSLY RULING THE FEBRUARY 27, 2004 INTERLOCUTORY ORDER WAS "FINAL" ORDER, AND DISMISSING PERMISSIVE APPEAL FOR BEING UNTIMELY, FILED MAY 26, 2004

IN THE SUPREME COURT
OF THE STATE OF IDAHO

ORDER

NO. 99512
Ref. No. 04S-129

Filed: May 26, 2004

IN THE MATTER OF THE PETITIONER'S MOTION FOR PERMISSION TO APPEAL FROM DISTRICT COURT'S INTERLOCUTORY ORDER ENTERED FEBRUARY 27, 2004

STACY A. GIBSON,

Petitioner,

v.

ADA COUNTY, a political subdivision and governmental agency of the State of Idaho and the ADA COUNTY SHERIFF'S OFFICE,

Respondents.

A MOTION FOR PERMISSION TO APPEAL FROM DISTRICT COURT'S INTERLOCUTORY ORDER ENTERED FEBRUARY 27, 2004 with attachments was filed

Appendix 21

by Petitioner April 22, 2004. An OBJECTION TO PETITIONER'S MOTION FOR PERMISSION TO APPEAL, which contained a request for attorney fees, was filed was filed by Respondents May 5, 2004 to which a RESPONSE with attachments was filed by Petitioner May 14, 2004 and an OBJECTION TO PETITIONER'S RESPONSE was filed by Respondents May 21, 2004. The Court being full advised; therefore, after due consideration,

IT IS HEREBY ORDERED that the MOTION FOR PERMISSION TO APPEAL FROM DISTRICT COURT'S INTERLOCUTORY ORDER ENTERED FEBRUARY 27, 2004 be, and herby is, DISMISSED as it is from a final order and is not timely.

IT IS FURTHER ORDERED that Respondents' request for attorney fees be, and hereby is, DENIED.

DATED this 26th day of May, 2004

By Order of the Supreme Court

s/ Frederick C. Lyon
Frederick C. Lyon, Clerk

cc: Counsel of Record

APPENDIX 22 – NOTICE OF REASSIGNMENT, FILED APRIL 22, 2004

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

Case No. CVOC0305850D

NOTICE OF REASSIGNMENT

Filed: April 22, 2004

STACY A. GIBSON,

Plaintiff,

v.

ADA COUNTY AND ADA COUNTY SHERIFF'S OFFICE,

Defendant.

NOTICE IS HEREBY GIVEN That the above-entitled case has been reassigned to the Honorable JOEL D. HORTON.

Dated this 22 day of APRIL 2004.

J. David Navarro
Clerk of the District Court
ADA County, Idaho

By: */s B. Frankl*
Deputy Clerk

APPENDIX 23 – ORDER DENYING PETITION FOR JUDICIAL REVIEW AND MOTION TO REMAND CASE ENTERED BY JUDGE D. DUFF MCKEE, FOURTH DISTRICT COURT (DOCKET NO. 30976) FILED FEBRUARY 27, 2004

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

Case No. CV OC 0305850D

ORDER DENYING PETITION FOR JUDICIAL REVIEW AND MOTION TO REMAND CASE

Filed: February 27, 2004

STACY A. GIBSON,

Petitioner,

v.

ADA COUNTY, a political subdivision and governmental agency of the State of Idaho AND THE ADA COUNTY SHERIFF'S OFFICE,

Respondents.

The above matter having come on for hearing before the Court on the 15th day of October 2003, and Petitioner appearing through her attorney, and Respondents appearing through their attorney, and all required notices having been given and the Court having heard the arguments presented and having reviewed the records and documents on file herein, and good cause appearing,

Appendix 23

THE COURT HEREBY FINDS THAT:

1. On or about June 4, 2003, Petitioner submitted a Petition for Hearing with the Ada County Board of Commissioners regarding the termination of Petitioner's employment with the Ada County Sheriff's Office.

2. The Ada County Board of Commissioners denied said Petition For Hearing on the grounds that there is no process by which a Board of County Commissioners may review an employment decision of another elected county official.

3. Petitioner then filed a Petition for Judicial Review with this Court on July 30, 2003, regarding the Ada County Board of Commissioners denial of the Petition for Hearing.

4. On August 13, 2003, Petitioner subsequently filed a Motion to Remand Case to the Ada County Board of Commissioners for the purposes of eliciting an additional agency record in this matter.

5. The existing agency record is sufficient and no remand is necessary as the matter at issue in this case is a question of law.

6. Pursuant to Rule 84, I.R.C.P., a petition for judicial review will only lie if permitted by statute.

7. There exists no statute or constitutional authority under Idaho law allowing a Board of County Commissioners to review the personnel decisions of other elected County officers

THEREFORE, IT IS HEREBY ORDERED:

Appendix 23

1. Petitioner's Motion to Remand Case is hereby denied.

2. Petitioner's Petition for Judicial Review is denied, provided, however, that Petitioner shall have leave to amend this action within thirty (30) days of the date of this Order to make common law claims, if applicable.

ORDERED this 27th day of Feb., 2004.

s/ D. Duff McKee
D. Duff McKee
District Judge

APPENDIX 24[9] – MEMORANDUM [HISTORICAL ANALYSIS OF ADA COUNTY MERIT SYSTEM] IN SUPPORT OF MOTION TO RECONSIDER INTERLOCUTORY ORDER CONDITIONALLY DENYING AND DISMISSING PETITION FOR JUDICIAL REVIEW, WITH LEAVE TO AMEND, LODGED JANUARY 30, 2004

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

Case No. CVOC 0305850D

MEMORANDUM IN SUPPORT OF MOTION TO RECONSIDER INTERLOCUTORY ORDER CONDITIONALLY DENYING AND DISMISSING PETITION FOR JUDICIAL REVIEW, WITH LEAVE TO AMEND THE PLEADINGS TO INCLUDE A COMMON LAW REMEDY

Filed: January 30, 2004

STACY A. GIBSON,

Petitioner,

v.

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[9] Due to the size of Appendix 23 (the memorandum is 82 pages, and includes 33 exhibits (262 pages)), it has only been summarized here. Upon request from the Court, Petitioner's counsel will supply the complete document if required.

Appendix 24

ADA COUNTY, a political subdivision and governmental agency of the State of Idaho and the ADA COUNTY SHERIFF'S OFFICE,

Respondents.

Petitioner's counsel prepared that memorandum in an effort to apprise the lower district court of the historical purview as to how and why the Ada County Personnel System was developed and enacted, as the Merit System of Employment, and to demonstrate the County's necessity in making the various amendments to that Merit System under developing Due Process Clause mandates so the County, as a public employer, would come into compliance with the recognition and evolution of developing Federal Law regarding the constitutional due process rights and guarantees of permanent classified public employees.

That memorandum provided the lower district court an extensive detailed accounting analysis of the County's enactment of the Ada County Personnel System, including amendments made to the original Ordinance No. 60, dated January 3, 1975, created by the Board of Ada County Commissioners for employees of the Ada County Sheriff's Office.

As part of the evolution-compliance process, on December 10, 1980, the Ada County Board of Commissioners adopted Ordinance No. 110, since Public Law 96-170 had been enacted December 29, 1979 (involving Title 42, U.S.C. § 1983), and created modifications to the Federal Civil Rights legislation as a comprehensive, remedial legislation for the deprivation of Federal constitutional and statutory rights. Consequently, the

Appendix 24

County Commissioners adopted said Ordinance No. 110, establishing a personnel system for all County employees. The Ordinance was published January 9, 1981, and sought to protect Ada County employees during grievance and appeal procedures. That was Ada County's first attempt to alleviate the "finality" of an employment termination imposed by an elected official, and correct the County's structured denial of due process, under color of law.

From February 2, 1983 through January 21, 1985, the Ada County Commissioners undertook to adopt eighteen (18) amendments to Ordinance No. 110. Those amendments were additions and deletions, and involved probation and probationary periods, permanent status, compensation and classification, dismissal and disciplinary actions, vacation, definitions, war veterans, sick leave, nepotism, leave of absence with pay, exempt employees, overtime, standards of conduct, and the complete removal and abandonment of the obsolete "finality" concept.

Ordinance No. 141 was adopted by the Ada County Commissioners on August 29, 1985, which repealed or modified sections of the County Personnel (Merit) System. Those changes included an attempt by the County (a public employer) to become compliant with the mandatory provisions and requirements concerning issues with the *Fair Labor Standards Act*, Title 29, U.S.C. § 201 *et seq.* (especially overtime).

Further Ordinances (No. 157, No. 179, and No. 182) were later adopted, amending definitions, compensation and classification language, and removing redundant language of Chapter 7 of the County Personnel System.

Appendix 24

On May 24, 1995, the Ada County Commissioners repealed the entire language found in § 1-7C-1, "Allocation of Pay Grades to Classes", and replaced it with a new paragraph entitled "Compensation", attempting to address the concerns and mandates of FLSA. The new paragraph became stated as follows:

> § 1-7C-1: "COMPENSATION: Notwithstanding any other Ada County Code provisions, department policy provisions, handbook provisions, letters, oral representations, or any other representations to the contrary, all compensation provided to all Ada County employees shall be in compliance with applicable provisions of the Fair Labor Standards Act (FLSA)." (Emphasis added).

On May 24, 1995, the Ada County Commissioners also adopted Ordinance No. 293, adding a new chapter Fourteen, designed to provide the County Commissioners a means to administratively review certain matters by hearing, receive evidence, and issue written decisions. This hearing process in conjunction with Idaho Code, § 67-2345, was the "method" the Idaho Supreme Court had expected Petitioner to utilize in pursuing her administrative remedies with Ada County before proceeding to the Fourth District Court. (See *Gibson v. Ada County Sheriff's Department*, 139 Idaho 5, 8, 72 P.3d 845 (2003).

Ordinance No. 293 (also called Chapter 14), creating the due process hearing required by law from a variety of enactments, stated as follows:

> § 1-14-1: "Purpose: The purpose of this chapter shall be to provide a procedure by which the Board

shall conduct hearings in land use, personnel, medical indigency, and other matters which, by federal, state, or county law, require the receipt of evidence, whether testimony, documents, or otherwise, and a response from the Board in the form of a written decision based on the record. (Emphasis added).

APPENDIX 25 – SUPPLEMENTAL ORDER ENTERED BY JUDGE RONALD J. WILPER, FOURTH DISTRICT COURT (DOCKET NO. 31553), FILED JANUARY 5, 2004

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

Case No. CVOC01-07394D

SUPPLEMENTAL ORDER

Filed: January 5, 2004

ADA COUNTY,

Plaintiff/Counterdefendant,

vs.

STACY A. GIBSON,

Defendant/Counterclaimant,

On 6/11/03 the court ruled that the Counterclaimant has a right to file an amended counterclaim because the plaintiff had not filed a reply to the original counterclaim.

A status conference was held in chambers on 12/30/03 with counsel for both parties present. It appears that the defendant/counterclaimant has been waiting for the disposition of a related case currently pending the appellate court The court has the inherent power to control litigation. The court

will allow the defendant/counterclaimant 30 days from the date of this order to file the proposed amended counterclaim.

IT IS SO ORDERED

1-3-04

/s/ Ronald J. Wilper
Ronald J. Wilper
District Judge

APPENDIX 26 – ORDER OF THE IDAHO SUPREME COURT DENYING PETITION FOR WRIT(S) OF MANDAMUS (DOCKET NO. 30976), FILED OCTOBER 17, 2003

IN THE SUPREME COURT
OF THE STATE OF IDAHO

ORDER DENYING PETITION
FOR WRIT(S) OF MANDAMUS

NO. 29968
Ref. No. 03S-246

Filed: October 17,2003

IN THE MATTER OF THE PETITION
FOR WRIT(S) OF MANDAMUS

STACY A. GIBSON,

Petitioner,

v.

ADA COUNTY, a political subdivision and governmental agency of the State of Idaho and the ADA COUNTY SHERIFF'S OFFICE,

Respondents.

A PETITION FOR WRIT(S) OF MANDAMUS with attachments and supporting MEMORANDUM with attachments was filed by Petitioner September 5, 2003. The Court is fully advised; therefore, after due consideration, IT IS HEREBY ORDERED that the PETITION FOR WRIT(S) OF MANDAMUS be, and hereby is, DENIED.

Appendix 26

DATED this 17th day of October 2003.

By Order of the Supreme Court

s/ Frederick C. Lyon
Frederick C. Lyon, Clerk

cc: Counsel of Record

APPENDIX 27 – MEMORANDUM IN SUPPORT OF PETITION FOR WRIT(S) OF MANDAMUS

IN THE SUPREME COURT OF THE STATE OF IDAHO

MEMORANDUM IN SUPPORT OF PETITION FOR WRIT(S) OF MANDAMUS

Filed: September 5, 2003

STACY A. GIBSON,

Petitioner,

v.

ADA COUNTY, a political subdivision and governmental agency of the State of Idaho and the ADA COUNTY SHERIFF'S OFFICE,

Respondents.

HISTORY OF UNDERLYING EVENTS

Over four (4) years ago, on July 19, 1999, Merrily Wilfong, Payroll Technician, Ada County Payroll Department, sent a facsimile transmission to the Budget Director of the Ada County Sheriff's Office, Kelli Bolicek, therein providing a detailed accounting of nine (9) Sheriff's Office employees who she believed were shorted pay from October 1998 through June 1999. See Exhibit 1. Deputy Gibson was one (1) of those nine (9) employees Payroll thought was owed back pay for overtime wages. That event confirmed there was a record-keeping problem in the payroll system of Ada County. The County then determined their own Payroll Department had in fact created and perpetuated an administrative error of Ms.

Gibson's wage and benefit records (a further acknowledgement of ongoing County FLSA violations), which error had in fact resulted in the County's disbursing overpayments to Ms. Gibson's joint bank account with her husband, through Ada County's direct deposit program, causing a mistaken receipt of funds into the joint account from the County's negligence and violations of the *Fair Labor Standards Act* (FLSA), 29 U.S.C. § 211 (c). This combination of misfortunate events caused by the Payroll Department personnel was then escalated by Ada County Sheriff, Vaughn Killeen, by his inappropriate and unlawful basis to discriminate, retaliate and wrongfully terminate Deputy Gibson, who had never been written up or ever disciplined, and had always been a loyal County employee, but occurred because of the erroneous wage and record-keeping process of the governmental agency and their Ada County Payroll Department. The underlying cause of this error was the flawed accounting process known to be in use back in 1998, and that flawed system was kept in effect by the County until January 10, 2002, when the events of this ongoing state of non-compliance was made a major issue and became of concern, and that caused administrative efforts to be taken to address need for some "level of" compliance with the Federal mandates.

It has become well known that prior to January 10, 2002, Ada County, as an FLSA employer, had not been in compliance with the mandatory provisions and conditions of FLSA in a variety of ways, and that fact was also pronounced in the Affidavit of Sharon M. Ullman (Exhibit 2, attached hereto) and the letter of February 12, 2001, containing five (5) options and five (5) attachments submitted by Theodore E. Argyle, Ada County Chief Deputy Attorney, Civil Division, to the Ada County Board of Commissioners (Exhibit 3, attached hereto). The

Appendix 27

Affidavit of Sharon Ullman, former Ada County Commissioner, and the communications from County officials, address the ongoing state of non-compliance and Mr. Argyle's list of five (5) options to pursue some level of performance with the law. These factors and documents have been made available to Ms. Gibson and her counsel, and are presented to this Court for background awareness of the history of these errors, and no fault of any employee. The Court will note the fifth option proposed by the County Legal Department was to do nothing, the effect of which was to allow the state of non-compliance to continue, demonstrating bad faith and ongoing County misconduct in the manner in which their obligation and duty is perceived as to the mandatory compliance standards with the Federal law. This disregard has added much to the concern over the arbitrary and capricious behavior of various officials in Ada County with the power to exercise certain authority.

Even though the Sheriff knew someone in the Payroll Department was responsible for creating and perpetuating this administrative error over Deputy Gibson's payments, and well knowing Ada County was an FLSA employer, required to comply with all provisions of the *Act*, Sheriff Killeen nonetheless chose to accuse Deputy Stacy Gibson of some element of misconduct, and did then take action by his effort to capriciously discriminate and retaliate against Deputy Gibson by instructing two (2) detectives to sequester and interrogate her on July 20, 1999.

On July 20, 1999, the day after the error was discovered, Ms. Gibson received a phone call from Detective Arville Glenn, requesting she report to the Sheriff's Office. She had been recovering from surgery, and she thought they had another special assignment for her, as they did with her on a

regular basis, creating much of her overtime benefits. When she arrived at the Ada County Sheriff's Office, these two (2) detectives of the Ada County Sheriff's Office subjected Ms. Gibson to two and one-half (2 ½) hours of confrontational interrogation.

During that interrogation process, those detectives called her a liar, accused Ms. Gibson of unlawful activities, threatened her with felony criminal charges and jail time, yet they knew before they interrogated her the substance of the issue involved was an administrative error in County Payroll, not a criminal issue, and also knew the error was created solely by the Payroll Department. Furthermore, they should have known the mistaken receipt of monies by Ms. Gibson in that joint account was a record-keeping payroll issue, and the employer was solely responsible for the disbursements, not the employee, and was controlled solely by the Federal *Fair Labor Standards Act* (FLSA), Title 29 U.S.C. § 201 *et seq.* Under FLSA, the employer is not allowed to transfer any record-keeping responsibilities to an employee. If the employer ever chooses to do so, he does so at his own risk and accounting peril.

The Sheriff, in the course of his capricious conduct, then placed Ms. Gibson on administrative leave, and later on in August 1999, placed her on administrative leave without pay, done in a manner that constituted another violation of the County Personnel System. Sheriff Killeen knew Ada County Payroll personnel had created the error, not Ms. Gibson; and knew (or should have known) no one, could transfer any of the record-keeping requirements of an FLSA employer to any employee. Despite that fact, the Sheriff blamed this employee for what happened and thereby tried to transfer the consequential effects of those FLSA record-keeping

responsibilities and violations to Ms. Gibson, and used that figment of transfer as his basis to accuse Ms. Gibson of wrongdoing, and claimed she had committed acts to justify termination, such as grand theft, and disgrace to the office, and used that flawed logic to constitute cause to fire her under Ada County Code, § 1-7G-3A (5) and § 1-7G-3A (20), and § 9.04 of the Ada County Sheriff's Office Policy Manual. (See attached definitions of those sections). When these proactive events occurred and his course of action taken against Ms. Gibson, it resulted in an exploitation of her protected employment and property rights, and did cause a discriminatory retaliation against Ms. Gibson, another violation of 29 U.S.C. § 215 (a)(3).

Of interest, the criterion used against Ms. Gibson by the Sheriff was her endorsement of the County pay voucher, which has since been discontinued by the County. Deputy Gibson, like all County employees, was required to sign a County pay voucher. When Stacy signed the pay voucher(s), she thought she was authorizing the County to pay her base salary of $1,550.00. That specific amount is disclosed and shown directly within the script on the pay voucher. It was her belief she was authorizing Payroll to pay also whatever was their accounting of her accumulating overtime. Ms. Gibson understood the voucher had been inaccurate from the first pay period of her employment and the first wage payment. She was soon made to understand her signature, regardless of the voucher content, would be needed to authorize Payroll to pay the wages due her.

Ada County Payroll Department disbursed the only wages to any and all County employees. The Sheriff's Office does not pay any County employees. The Ada County payroll Department had programmed their payroll system (computer

system) to determine what wage disbursement was to be made to any given County employee through the County's Direct Deposit Program. Approximately one (1) week prior to any monthly wage disbursement, the Payroll Department printed out a pay voucher and delivered them to any given County Department, including the Sheriff's Office. Whether the amounts indicated on a pay voucher were correct or incorrect, before any employee, such as Ms. Gibson, could receive any disbursement of any wages, the employee had to sign the voucher, as a verbal notification was given by their supervisor (and Payroll Department personnel), that if they wanted to get paid, they shall sign a pay voucher, regardless whether the pay voucher was incorrect, or the subsequent disbursement of wages was correct. If the pay voucher (correct or incorrect) was not signed by the County employee, County Payroll would not disburse a wage payment to that employee.

The Sheriff's Office was not set up in the system to handle payroll, and could not disburse any wage or salary to any employee. Therefore, the Ada County Payroll Department had the exclusive, statutory duty to maintain *Fair Labor Standards Act* (FLSA) compliance and keep records and pay out all wages justly due to the County employees, which included all employees with the Sheriff's Office.

Both Kelli Bolicek, Budget Director for the Ada County Sheriff's Office, and Marshia Eiguren, Ada County Payroll Department Technician, have confirmed the Payroll Department did in fact create and perpetuate the administrative payroll error (because of the record-keeping system), and that event they confirmed caused Stacy Gibson's overpayment and mistaken receipt of money. Federal law would classify that event to be the result of an FLSA violation. Their acknowledgement described how their Payroll Technician

incorrectly programmed the County payroll system (computer) to disburse an incorrect amount of wage to Ms. Gibson's bank account because of the inaccurate wage information entered by the Technician into the computer, essentially commanding the computer payroll system to automatically and monthly, disburse an incorrect wage calculated on Ms. Gibson's old position, and also a wage calculated on her employment position at the Jail Facility. Once the County determined the error, Payroll Department personnel manually went into the County computer payroll system and deleted the incorrect wage information and halted the incorrect disbursements. These County personnel addressed the specific steps and precautions then taken to prevent any future administrative errors (and FLSA violations) of this nature.

It has not yet been accurately disclosed how long Ada County has been *out-of-compliance* with the *Fair Labor Standards Act*, but according to public records, the County has officially recognized its ongoing state of FLSA non-compliance, and for that reason, action was taken, effective *circa* January 10, 2002, to bring it into a level of compliance, and the County did make major changes in the method and means by which the County Departments maintained employee wage records, and how record-keeping and disbursements are to be accomplished, including the long overdue removal of the mandatory signature on the "pay voucher" or "claim form", and effective *circa* January 10, 2002, County employees are *no longer* required to *sign* any "*pay voucher*" or "*claim form*".

Shortly after July 20, 1999, Vernon K. Smith, Attorney At Law, was requested to be Ms. Gibson's legal representative concerning any allegations of criminal conduct as Sheriff Killeen had threatened, and any false charges he might cause to be filed against her.

Approximately a week later, on Wednesday, July 28, 1999, Mr. Smith received a phone call from Mr. R. Monte MacConnell, acting for the Sheriff as the Sheriff's Legal Advisor. Mr. MacConnell stated to Mr. Smith the Sheriff wanted Deputy Gibson terminated, and if Ms. Gibson would not resign from the Sheriff's Office, she would be processed with felony charges for grand theft and then terminated.

Of concern, according to Idaho law, in Quiring v. Quiring, 130 Idaho 560, 944 P.2d 695 (1997), the Idaho Supreme Court expressly stated that:

> "Obtaining the transfer of property by a threat of arrest or exposure to hatred, contempt or ridicule is theft by extortion and violates I.C. § 18-2403";
>
> "A person obtains property by extortion when he compels or induces another person to deliver such property to himself or to a third person by means of instilling in him a fear that, if the property is not so delivered, the actor or another will: . . . (4) Accuse some person of a crime or cause criminal charges to be instituted against him; or (5) Expose a secret or publicize an asserted fact, whether true or false, tending to subject some person to hatred, contempt or ridicule. . . .;
>
> I.C. § 18-2403 (2)(e).

Additionally, the Supreme Court has stated:

Appendix 27

> "It makes no difference whether the threat of arrest was a lawful or unlawful arrest. *Wilbur v. Blanchard*, 22 Idaho 517, 519, 126 P. 1069, 1071 (1912).".

Mr. MacConnell conveyed his threat as perceived, solely for the purpose of to appropriating Ms. Gibson's property right of tenured employment, as that was the substance of his communication when he called Mr. Smith's office on July 28, 1999. Mr. Smith was required to be very specific as to what Mr. MacConnell's statement and proposal was, and later was told by Ms. Gibson to incorporate the substance of what happened into an Affidavit, to preserve the account of that communication. Mr. Smith believed it was his duty to convey the message to Ms. Gibson just as it was specifically presented to him, with the details of that conversation and the consequences if she refused to resign, and the agony and consequences to be avoided if she cooperated with the Sheriff's demands. Attached as Exhibit 4, is a copy of Mr. Smith's Affidavit for the Court's reference.

Shortly after that communication, and the threat being conveyed to Ms. Gibson, the proposal was unconditionally rejected, and Ms. Gibson became informed thereafter that on August 9, 1999, Greg H. Bower, the Ada County Prosecutor, at Mr. MacConnell's request, did send a letter to Mr. John Christensen, Chief Criminal Prosecutor in Canyon County, Idaho, giving him authorization "to file charges in this case…", and therein stating "I will have you appointed as special prosecutor".

This communication was later discovered, and found to be without legal cause or statutory basis, and later was confirmed to be issued contrary to statute. Mr. Bower, at Mr.

MacConnell's request, was seeking the prosecution of Ms. Gibson without any factual basis. Furthermore, such conduct of prosecutorial appointment was not authorized by Idaho Code §31-2603 (a); that such letter suggesting "authorization", was undertaken solely for the benefit of the Sheriff, designed to carry forward the ramifications of the threat communicated by Mr. MacConnell, as it was his sole intent to instill a fear of criminal charges to frighten Ms. Gibson into resigning, which was perceived by Petitioner to be more of their arbitrary and discriminatory behavior, pursued solely for their vengeful and reactionary purpose, and though felt such malicious criminal allegations would be unsuccessful in the end result, nonetheless was viewed by Petitioner as a frightening experience, and such action would serve to impugn her character, and would create the need to incur substantial expense if Petitioner was required to actively defend against any malicious and unfounded charges.

PURPOSE OF MANDATE

The subject matter of this Petition concerns the right to hearing over the action of the Ada County Sheriff, as was pursued with his termination of Petitioner from her employment as a Jail Technician, and also as to the County's failure to conduct such an administrative hearing; that Petitioner's discharge was constructed against her in a retaliatory manner by Sheriff Killeen and other Ada County agents because of no reason other than these erroneous wage overpayments made by the Ada County Payroll Department to Petitioner's joint checking account, caused by an administrative payroll error, being a consequence and resulting effect of the failure of the Ada County Payroll Department to perform mandatory record-keeping provisions for accurate and correct wage and pay records pursuant to the Federal *Fair*

Appendix 27

Labor Standards Act (FLSA), Title 29 U.S.C. § 201 *et seq*. To date, Ms. Gibson has been denied her right to a hearing before the County Board, a hearing she is entitled to in accordance with her due process rights and tenured employment created by the County Code, as authorized by Ada County Code, § 1-14-1 through § 1-14-8, and as perceived by the Supreme Court of Idaho in its Opinion No. 62, issued May 28, 2003.

PROCEDURAL HISTORY OF THE TERMINATION

That on August 2, 1999, pursuant to the Ada County Personnel System, Ada County Code, § 1-7G-3B, Sheriff Killeen sent notice to Petitioner of his intent to impose discipline upon her for cause, claiming Petitioner violated the provisions of Ada County Code, County Personnel System, § 1-7G-3A (5) and § 1-7G-3A (20), and § 9.04 of the Ada County Sheriff's Office Policy Manual. That on December 27, 1999, Sheriff Killeen sent notice to Petitioner that he did terminate Petitioner's employment.

Ms. Gibson appealed that decision under the County Personnel Policy, and a hearing was held before the Ada County Personnel Hearing Officer, G. Lance Salladay, on January 25th and 26th, 2000. Mr. Salladay was a staff member and paid as an employee of Ada County. (See Ada County Code, § 1-7G-3B through §1-7G-3N attached for reference).

On February 15, 2000, this County Hearing Officer affirmed the act of termination of Ms. Gibson's employment, and sustained the conduct of Sheriff Killeen.

On April 14, 2000, Ms. Gibson filed an Appeal of the Decision of the Ada County Personnel Hearing Officer with the Fourth District Court, pursuant to the appeal provisions and

instructions contained in the Ada County Code, § 1-7G-3(O). (See attached).

On May 7, 2001, Fourth District Judge Kathryn A. Sticklen, entered her Memorandum Decision and Order, affirming the decision of the Hearing Officer, subject to further judicial review by the Idaho Supreme Court, under the provisions of the County Ordinance. Of interest, the concept of County error had been addressed in the case of Jones v. Ada County, Fourth District Court, Ada County, Case No. CV OC 9800935D (1999). In that case, District Judge Deborah A. Bail ruled on August 4, 1999, that it was "shear caprice" to accuse an individual of misconduct when Ada County personnel had created an administrative (clerical) error.

From the decision rendered by Judge Sticklen, Ms. Gibson appealed to the Supreme Court of the State of Idaho, on June 18, 2001, and on May 28, 2003, the Idaho Supreme Court issued the Decision and Opinion No. 62 in Gibson v. Ada County Sheriff's Department, Case No. 27605, and therein vacated the judgment of the District Court, and dismissed the matter without prejudice, and stated in that Opinion, "it is the infirm appeal provision of A.C.C. § 1-7G-3(o), incorrectly instructing Gibson to appeal the decision of the county personnel hearing officer to the district court, which has prevented this Court from addressing the merits of this matter", and that "any attempt by the county to authorize judicial review of a personnel hearing officer's decision is infirm because it conflicts with the general laws of this State". The Supreme Court further stated, "Notably, had Gibson appealed the county personnel hearing officer's decision to the Ada County Board of Commissioners (board), the board's decision would be an appropriate subject for judicial review and the IAPA standard of review would apply. I.C. § 31-1506(1).

Without action of the board, however, the judicial review provisions of I.C. § 31-1506(1) are inapplicable".

For the reasons and direction given by the Supreme Court in its May 28, 2003 Decision, Ms. Gibson did request the Ada County Board of County Commissioners for a Board Hearing in accordance with the Ada County Code and Supreme Court Decision.

Her Petition for Review of this wrongful termination was submitted to the Ada County Board of Commissioners on June 4, 2003, and did notify the County of the "infirm" procedure before being utilized under the County Personnel System, Ada County Code, § 1-7G-3(O), and disclosed the fact the Idaho Supreme Court had declared that procedure to be infirm, and in contravention of statutory law, and announcing need to pursue agency review.

That Petition for Review was submitted as authorized by the Code in accordance with the Personnel Procedure identified in Ada County Code, § 1-14-1 through § 1-14-8, and undertaken as suggested by the Idaho Supreme Court in its Opinion No. 62.

On July 2, 2003, the Ada County Board of Commissioners submitted their response, and declined to take any action on the Petition, suggesting they had no authority over Sheriff terminations.

On July 16, 2003, Petitioner did request the Ada County Board of Commissioners to reconsider their position. That no action has been taken on said Motion for Reconsideration as of the date of submitting this brief and the Petition.

Appendix 27

Petitioner, having received no further response from Respondents, did file a Petition for Judicial Review (Case No. CV OC 0305850D) with the Fourth District Court, County of Ada, on July 30, 2003, and Judge D. Duff McKee was assigned and now presiding.

Pursuant to Idaho Code, § 67-5271, Petitioner had exhausted her available administrative remedies available to her in accordance with the Ada County Code and the *Idaho Administrative Procedures Act*, and no Record of any agency action exists, and none was created as no review hearing was granted.

On August 13, 2003, Petitioner requested the Fourth District Court to then remand her action to the Ada County Board of Commissioners, directing them to create a Record through a due process hearing, with a full and complete evidentiary hearing pursuant to Ada County Code, § 1-14-1 through § 1-14-8, requiring receipt of all evidence, testimony, and documents, and a complete response from the Board of Ada County, containing factual findings, conclusions of law, and a written decision based on the full and complete Record on all relevant issues raised in the Petitions for Review of the termination of employment.

Judge McKee issued an Order on August 20, 2003, designed to Govern Judicial Review, the effect of which serves to delay Petitioner's right to due process, as said "Governing Order" directs the preparation of a non-existent agency Record within forty-two (42) days. The nonexistent Record was a fact already known to the assigned Judge McKee, by virtue of the Motion for Remand.

Appendix 27

That Petitioner is an aggrieved party as a result of the denial of any speedy, plain and adequate remedy from this administrative agency's denial of a hearing, and Petitioner is entitled to intervention by the Idaho Supreme Court, in the form of an alternative Writ of Mandamus, directing the Ada County Board of Commissioners, pursuant to Title 7, Chapter 3, Statutes of the State of Idaho, to provide Petitioner a full and complete evidentiary hearing in the form of required due process, pursuant to Ada County Code, § 1-14-1 through § 1-14-8, requiring receipt of all evidence, testimony, and documents, and a complete response from the Board of Ada County, containing factual findings, conclusions of law, and a written decision based on the full and complete Record on all relevant issues involved in Petitioner's termination.

The Ada County Board of Commissioners have intentionally denied Petitioner a right to a due process hearing, for reasons we believe to delay the proceedings hopefully indefinitely in this matter, thus denying Petitioner an adequate remedy in the ordinary course of law, and the County Board has a clear, mandatory, ministerial and legal duty to provide Petitioner with a due process hearing. See Edwards v. Industrial Com'n of State, 130 Idaho 457, 943 P.2d 47 (1997), Idaho Falls Redev. Agency v. Countryman, 119 Idaho 43,794 P.2d 632 (1990), and Cowles Pub. Co. v. Magistrate Court, 118 Idaho 753, 800 P.2d 640 (1990).

The facts of this case demonstrate there has been an absence of a speedy remedy in the ordinary course of law and pursuant to Idaho Code, § 7-303, this Court should issue the alternative Writ of Mandamus, directing the reinstatement of Petitioner to her employment, or directing the County to create a Record, pursuant to the verified Petition submitted to the

Appendix 27

County for a Hearing and Review of the Sheriff's termination of Petitioner.

Dated this 5th day of September 2003

S/ Vernon K. Smith
Vernon K. Smith
Attorney for Petitioner

APPENDIX 28 – VERIFIED PETITION FOR WRIT(S) OF MANDAMUS

IN THE SUPREME COURT
OF THE STATE OF IDAHO

PETITION FOR WRIT(S) OF MANDAMUS

Filed: September 5, 2003

STACY A. GIBSON,

Petitioner,

v.

ADA COUNTY, a political subdivision and governmental agency of the State of Idaho and the ADA COUNTY SHERIFF'S OFFICE,

Respondents.

COMES NOW The Petitioner above-named, through counsel, Vernon K. Smith, and does request this Court, pursuant to Rule 5 and 43, I.A.R., to enter its Writ(s) of Mandamus, compelling Ada County, a political subdivision and governmental agency of the State of Idaho, acting through its Board of Ada County Commissioners, to provide relief to Petitioner as prayed for herein. Petitioner does allege a factual basis and state as follows:

I.

That Petitioner, at all times mentioned herein, is a citizen of the United States of America, a resident of the State of Idaho, and a resident of Ada County, Idaho.

II.

That Ada County is a political subdivision of the State of Idaho, and a statutorily authorized government agency; that the Ada County Board of Commissioners are the elected public officials of said governmental agency; that Ada County Sheriff's Office is a Department within this political subdivision and governmental agency of said Ada County.

III.

That the Idaho Supreme Court has jurisdiction over this subject matter, and is the proper venue of this action, pursuant to and in accordance with Article V, § 9 of the Idaho Constitution, Title 7, Chapter 3, Statutes of the State of Idaho, and § 1-203, Idaho Code.

IV.

That the subject matter of this Petition does concern the action of said Ada County's Sheriff's Office over the termination of Petitioner from her employment as a Jail Technician with Ada County, within the Department of the Ada County Sheriff's Office, and Ada County's failure to conduct a due process administrative hearing regarding the challenge raised over this wrongful termination; that Petitioner's discharge is believed to have been constructed against her in a retaliatory manner by Sheriff Vaughn Killeen, and other Ada County agents, because of erroneous wage overpayments made through the Ada County Payroll Department to Petitioner's joint checking account, the result of an administrative payroll error, being a consequence and resulting effect of the failure of Ada County and the Ada County Payroll Department to perform mandatory record-

keeping provisions for accurate and correct wage and pay records pursuant to the Federal *Fair Labor Standards Act* (FLSA), Title 29 U.S.C. § 201 *et seq*. That Petitioner did contend, and does continue to aver said termination was wrongful, arbitrary, capricious, contrary to law, a violation of the Ada County personnel merit system, and came about as a consequence of the County's various violations of the provisions of the *Fair Labor Standards Act*, statutory violations of Idaho Code, and now the failure of said agency to conduct a hearing at the Board level, now resulting in a denial of due process, and the fundamental part and essence of the subject matter concern and need for review.

V.

That the Ada County Payroll Department, within said governmental agency, has historically been violating the statutory duty to County employees by failing to perform mandatory compliance with the provisions of the *Fair Labor Standards Act*, 29 U.S.C. § 201 *et seq*. (FLSA), and as a result thereof, and in this dispute, payroll funds were deposited into the automatic payroll deposit to Petitioner's joint account, later identified by Ada County Payroll personnel to have been their administrative error, and of no fault of Petitioner. That the County's non-compliance and violations of the record-keeping provisions of FLSA caused the resulting effects of an abusive internal investigation and two (2) confrontational interrogations of Petitioner, and then lead to extortious threats to criminally prosecute Petitioner for grand theft, if she would not tender her immediate resignation of her protected and tenured employment, sought as being the Sheriff's method of resolution of this overpayment issue, and said Petitioner was told she could not retain her property right of tenured employment, and if she declined to resign, she would be

criminally charged and then also terminated by the Sheriff under his theory of cause. That Petitioner was denied her right to challenge her protected rights to employment or pursue any lawful rights for the ongoing FLSA violations. That Petitioner rejected the County's demands, and as a consequence of Petitioner's rejection of what was perceived to be an extortious offer and threat to her property rights, Petitioner did then suffer the exposure and consequence of the threats of criminal prosecution, but filing of such formal charges was declined by the independent analysis of Canyon County under conflict review; that Petitioner was nonetheless still subjected to termination of her employment as threatened by the Ada County Sheriff, as retaliation for her refusal to resign, constituting a capricious termination of her employment, and the malicious disregard of Petitioner's protected rights, and tenured employment that requires just cause for termination under the Ada County merit system.

PROCESS UTILIZED UNDER THE ADA COUNTY CODE

VI.

That on August 2, 1999, pursuant to the Ada County Personnel System, Ada County Code, § 1-7G-3B, Sheriff Killeen sent notice to Petitioner of his intent to impose discipline upon her for cause, claiming Petitioner violated the provisions of Ada County Code, County Personnel System, § 1-7G-3A (5) and § 1-7G-3A (20), and § 9.04 of the Ada County Sheriff's Office Policy Manual. That on December 27, 1999, Sheriff Killeen sent notice to Petitioner that he did terminate Petitioner's employment.

Appendix 28

VII.

That Ms. Gibson "appealed" the Sheriff's decision pursuant to the provisions and instructions contained in the Ada County Code, § 1-7G-3C, and as disclosed in Sheriff Killeen's letter of December 27, 1999; that a personnel hearing was held on January 25th and 26th, 2000 before the Ada County Personnel Hearing Officer, G. Lance Salladay, a staff member and services paid as an employee of Ada County. (See Ada County Code, § 1-7G-3B through §1-7G-3N).

VIII.

That on February 15, 2000, the Ada County Hearing Officer affirmed the termination of Petitioner's employment with the Ada County Sheriff's Office, and arbitrarily sustained the conduct of Sheriff Killeen.

IX.

That on April 14, 2000, Petitioner, filed a Notice of Appeal of the Decision of the Ada County Personnel Hearing Officer, with the Fourth District Court, Ada County, pursuant to the appeal provisions and instructions contained in said Ada County Code, § 1-7G-3O.

X.

That on May 7, 2001, Fourth District Judge, Kathryn A. Sticklen, entered her Memorandum Decision and Order, affirming the decision of the Ada County Personnel Hearing Officer, subject to further judicial review by the Idaho Supreme Court, under the provisions of the County Ordinance.

Appendix 28

XI.

That on June 18, 2001, Petitioner did file her Notice of Appeal with the Supreme Court of the State of Idaho, pursuant to the provisions of § 1-7G-3(O) of the Ada County Code and instructions for review, and on May 28, 2003, the Idaho Supreme Court issued a Decision as reflected in its Opinion No. 62 in Gibson v. Ada County Sheriff's Department, Case No. 27605.

XII.

That in that Decision and Opinion No. 62, the Supreme Court vacated the judgment of the District Court, and dismissed the matter without prejudice, and stated in that Opinion, "it is the infirm appeal provision of A.C.C. § 1-7G-3(o), incorrectly instructing Gibson to appeal the decision of the county personnel hearing officer to the district court, which has prevented this Court from addressing the merits of this matter", and that "any attempt by the county to authorize judicial review of a personnel hearing officer's decision is infirm because it conflicts with the general laws of this State" (Emphasis added), and further stated, "Notably, had Gibson appealed the county personnel hearing officer's decision to the Ada County Board of Commissioners (board), the board's decision would be an appropriate subject for judicial review and the IAPA standard of review would apply. I.C. § 31-1506(1). Without action of the board, however, the judicial review provisions of I.C. § 31-1506(1) are inapplicable".

XIII.

That for the reasons and direction given by the Supreme Court in its May 28, 2003 Decision, said Petitioner did petition

the Ada County Board of County Commissioners for a Board Hearing in this matter in accordance with those further provisions of Ada County Code, pursuant to the Supreme Court Decision.

XIV.

That Petitioner did submit her Petition for Review of her termination to the Ada County Board of Commissioners, on June 4, 2003, and did notify the County of the "infirm" procedure before being utilized under the County Personnel System, Ada County Code, § 1-7G-3(O), and did address the fact the Idaho Supreme Court did issue its Opinion No. 62, on May 28, 2003, thereby declaring the County appeal procedure to be "infirm", and in contravention of statutory law, and announcing need to pursue agency review before entering the judicial arena to obtain judicial relief; that a copy of said Petition to the Board for Agency Review is attached hereto, made a part hereof, and incorporated by reference as though set forth in full herein.

XV.

That said Petition for Board Review was submitted in accordance with the Ada County Personnel Procedure, identified in Ada County Code, § 1-14-1 through § 1-14-8, and undertaken as perceived by the Idaho Supreme Court in its Opinion No. 62.

XVI.

That on July 2, 2003, the Ada County Board of Commissioners submitted a letter response, therein stating they declined to take any action on the Petition for Board Review

and denied any relief. A copy of the Commissioner's denial letter is attached hereto, made a part hereof, and incorporated by reference as though set forth in full herein.

XVII.

That on July 16, 2003, Petitioner did request the Ada County Board of Commissioners to reconsider their position, a copy of which is attached hereto, made a part hereof, and incorporated by reference as though set forth in full herein. That no action has been taken on said Motion for Reconsideration as of the date hereof.

XVIII.

That Petitioner, having received no further response in any form from Ada County, did file with the Fourth District Court, County of Ada, on July 30, 2003, a Petition for Judicial Review (Case No. CV OC 0305850D), whereupon Judge D. Duff McKee was assigned to the case. A copy of Petitioner's Petition for Judicial Review is attached hereto, made a part hereof, and incorporated by reference as though set forth in full herein.

XIX.

That pursuant to Idaho Code, § 67-5271, Petitioner did come to believe she has exhausted her available administrative remedies known to her and available in accordance with the Ada County Code and the *Idaho Administrative Procedures Act*; that Petitioner did pursue relief from the District Court, but to accomplish that, a Record of the agency action must be created for review, and in this situation, no such agency Record

exists, as the Board refused to take up any action but to deny the right to a hearing.

XX.

That on August 13, 2003, Petitioner requested the Fourth District Court to remand this action to the Ada County Board of Commissioners to create a Record through a due process hearing, with a full and complete evidentiary hearing pursuant to Ada County Code, § 1-14-1 through § 1-14-8, requiring receipt of all evidence, testimony, and documents, and a complete response from the Board of Ada County, containing factual findings, conclusions of law, and a written decision from the Board based on the full and complete Record on all relevant issues raised in the agency level Petition for Review of the termination of her employment. A copy of Petitioner's Motion for Remand and Memorandum in Support of her Motion for Remand are attached hereto, made a part hereof, and incorporated by reference as though set forth in full herein.

XXI.

That said Judge McKee issued an Order Governing Judicial Review, dated August 20, 2003, the effect of which does serve to cause delay in Petitioner's right to due process, as said "Governing Order" directs the preparation of an agency Record within forty-two (42) days, well knowing no such agency Record exists, and a fact already known to the assigned Judge, from the Motion contents and attached letter of the County Board. A copy of Judge McKee's Order is attached hereto, made a part hereof, and incorporated by reference as though set forth in full herein.

Appendix 28

XXII.

That Petitioner is an aggrieved party as a result of these ongoing events and delays, and Petitioner is denied any speedy, plain or adequate remedy from this termination, either by administrative agency or the District Court, and Petitioner does believe she is entitled to intervention by the Idaho Supreme Court, either in the form of employment reinstatement, or an alternative Writ of Mandamus, directing the Ada County Board of Commissioners, pursuant to Title 7, Chapter 3, Statutes of the State of Idaho, to forthwith provide Petitioner with a due process hearing, and afford Petitioner a full and complete evidentiary hearing pursuant to Ada County Code, § 1-14-1 through § 1-14-8, requiring receipt of all evidence, testimony, and documents, and to the preparation of a complete response from the Board of Ada County, containing factual findings, conclusions of law, and a written decision based on the full and complete Record of all relevant issues involved in Petitioner's request for a hearing and Review.

WHEREFORE, Petitioner does pray for relief as follows:

1. This Court take either the immediate action to reverse the December 27, 1999 termination of Petitioner by Ada County Sheriff, Vaughn Killeen, and the February 15, 2000 Decision of the Ada County Personnel Hearing Officer, G. Lance Salladay, and fully reinstate Petitioner to her employment position as a Jail Technician with the Ada County Sheriff's Office, and provide her all wages, benefits and entitlements that would have accrued to her, or in the alternative, issue a Writ of Mandamus as requested herein, and thereby compel the County Board to provide a due process hearing and afford Petitioner a full and complete evidentiary hearing pursuant to Ada County Code, § 1-14-1 through § 1-

14-8, requiring receipt of all evidence, testimony, and documents, and a complete response from the Board of Ada County, containing factual findings, conclusions of law, and a written decision based on the full and complete Record of all relevant issues involved in Petitioner's request for a hearing and Review.

2. That Petitioner recover all costs and attorney fees incurred in this proceeding pursuant to issuance of peremptory Writ(s) of Mandamus, as provided for by Idaho Code, § 7-312.

3. For such other and further relief as this Court may deem just and proper in the premises.

Dated this 5th day of September 2003.

s/ Vernon K. Smith
Vernon K. Smith
Attorney for Petitioner

STATE OF IDAHO)
: ss
County of Ada)

Stacy A. Gibson, being first duly sworn upon oath, deposes as follows:

That I have read the above and foregoing Petition for Writ(s) of Mandamus; that I know the contents thereof; and the facts therein stated I believe to be true.

s/ Stacy A. Gibson
Petitioner

Appendix 28

SWORN AND SUBSCRIBED to before me this 5th day of September 2003.

s/ Vernon K. Smith
Notary Public for Idaho
Residing at Boise, Idaho
My Commission Expires: 12/20/06

APPENDIX 29 – ORDER GOVERNING JUDICIAL REVIEW ENTERED BY JUDGE D. DUFF MCKEE, FOURTH DISTRICT COURT (DOCKET NO. 30976), FILED AUGUST 20, 2003

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

Case No. CV OC 0305850D

ORDER GOVERNING JUDICIAL REVIEW

Filed: August 20, 2003

STACY A GIBSON,

Petitioner,

vs.

ADA COUNTY, a political subdivision and governmental agency of the State of Idaho AND THE ADA COUNTY SHERIFF'S OFFICE,

Respondents.

Petition for Judicial Review having been filed herein, and it appearing that the issues presented on appeal are questions of law and fact; and it further appearing that a transcript is necessary to process this appeal;

It is ORDERED:

1) That the Agency shall transmit to the Court the original or a certified copy of the entire record in this proceeding within

forty-two (42) days after the service of the petition for judicial review.

2) That the Agency, upon lodging with the Court the record, shall send notice of such filing to all parties;

3) That the parties have twenty-one (21) days from the date that notice is mailed within which to file objections to the record. If no objections are received, the record shall be deemed settled.

4) That the Petitioner's brief shall be filed and served within thirty-five (35) days of the date the record is lodged.

5) That the Respondent's brief shall be filed and served within twenty-eight (28) days after service of Petitioner's brief.

6) That Petitioner's reply brief, if any, shall be filed and served within twenty-one (21) days after service of Respondent's brief.

7) That either party may notice the matter for oral argument after all briefs are filed, and that if within fourteen (14) days after the final brief is filed, neither party does so notice for oral argument, the Court will deem oral argument waived and decide the case on the briefs and the record.

Dated this 19th day of August 2003

s/ D. Duff McKee
D. DUFF MCKEE
Senior District Judge

APPENDIX 30 – ORDER WITHDRAWING ORDER DENYING MOTION FOR RECONSIDERATION AND ORDER ENTERED BY JUDGE RONALD J. WILPER, FOURTH DISTRICT COURT (DOCKET NO. 31553), FILED JUNE 11, 2003

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

Case No. CVOC01-07394D

ORDER WITHDRAWING ORDER DENYING MOTION FOR RECONSIDERATION AND ORDER

Filed: June 11, 2003

ADA COUNTY,

Plaintiff/Counterdefendant,

vs.

STACY A. GIBSON,

Defendant/Counterclaimant.

This matter came before the court on the defendant/counterclaimant's motion for permission to appeal the court's interlocutory order denying a motion to amend the counterclaim.

Upon further consideration and good cause appearing therefore, it is hereby ordered and this does order that the counterclaimant may file an amended counterclaim pursuant to

Appendix 30

Rule 15, I.R.C.P. as a matter of right because no responsive pleading to the original counterclaim has been filed.

IT IS SO ORDERED.

6-11-03

s/ Ronald J. Wilper
Ronald J. Wilper
District Judge

APPENDIX 31 – MEMORANDUM IN SUPPORT OF [GIBSON] MOTION FOR PERMISSION TO APPEAL FROM DISTRICT COURT'S INTERLOCUTORY ORDER ENTERED FEBRUARY 19, 2003 BY JUDGE RONALD J. WILPER, FOURTH DISTRICT COURT (DOCKET NO. 31553), LODGED MAY 16, 2003

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

Case No. CV OC 0107394D

MEMORANDUM IN SUPPORT OF MOTION FOR PERMISSION TO APPEAL FROM DISTRICT COURT'S INTERLOCUTORY ORDER ENTERED FEBRUARY 19, 2003

Filed: May 16, 2003

ADA COUNTY,

Plaintiff/Counterdefendant,

vs.

STACY A. GIBSON,

Defendant/Counterclaimant.

INTRODUCTION

The Defendant/Counterclaimant above-named, through counsel, Vernon K. Smith, pursuant to Rule 12, I.A.R., and Rule 7 (b)(3), I.R.C.P., has requested this Court to enter an

order, thereby granting Defendant judicial permission to appeal the District Court's interlocutory order entered February 19, 2003 to the Idaho Supreme Court for Appellate Review in order to bring into focus the controlling question of the application of the *Fair Labor Standards Act* (FLSA) as a legitimate claim to be raised by Defendant as a defense, and as a lawful counterclaim, regarding the rights of Defendant and the violation of her employment rights, resulting from the inadequate wage and record-keeping procedure utilized by Ada County and the County Payroll Department, the effects of which caused the administrative error and overpayment of Defendant's monthly wages into a joint checking account under the direct deposit system as then being used by the County, resulting in Defendant's mistaken receipt of funds, due to the County's negligence and violation of the FLSA provision announced in 29 U.S.C. § 211 (c). Defendant-Counterclaimant does contend the subject matter in dispute does involve a controlling question of law, as to the application of FLSA as a defense and as a cause of action, and the current District Court Order does preclude this moving party from asserting that defense and claim, and said Defendant does believe the effects thereof are contrary to existing Federal law, as it does prevent her from defending and advancing her cause of action as provided for in her Amended Counterclaim and subsequent pleadings to be processed in the Court.

STATEMENT OF FACTS

Defendant filed her Answer, Affirmative Defenses and Counterclaim in this case on May 7, 2002, therein providing detailed facts surrounding Defendant's employment and the protection and rights afforded to her under the terms, conditions and provisions of the Ada County Code, County Personnel System, § 1-7-1 through § 1-7L-10 and specifically

the Federal protection laws concerning employment, entitled the *Fair Labor Standards Act*, 29 U.S.C. § 201 *et seq.*, as applied to Defendant's employment under the statutory scheme of Federal law and by the specific language contained in the Ada County Code, § 1-7C-1.

On July 11, 2002, Defendant requested this Court to allow her to amend her counterclaim to more specifically describe the detail of her allegations, and specifically the manner in which Ada County and the Ada County Sheriff's Office had violated her rights and the provisions of the *Fair Labor Standards Act*, 29 U.S.C. § 211 (c), and the consequence of those violations that resulted in the mistaken receipt of funds. The effect of the overpayments was then being used as an unlawful basis by the County to wrongfully terminate Defendant, despite the fact the errors were caused by and resulted from the erroneous wage and record-keeping process used by the Ada County Sheriff's Office and Ada County Payroll Department. The administrative error was due to the flawed accounting process used back in 1998 and 1999, and in effect by the County until the events of that ongoing non-compliance was made a major issue of concern, and administrative efforts were taken to come into some level of compliance with Federal mandates, approximately January 10, 2002.

On February 19, 2003, the Court signed an Order (prepared by the counsel for Ada County) denying Defendant's Motion to Dismiss the County's case, and further ordered "Defendant's Motion to Amend Counterclaim, which sought to include an additional cause of action under the Fair Labor Standards Act, 29 U.S.C. § 211 (c), is denied." The effect of the Order was to deny Defendant her constitutional right to due process of law, and a judicial forum to seek redress for the County's abuse of

process and FLSA violations which, if left as it is currently ordered, may allow the County to escape judicial review and imposition of appropriate sanctions for their wage and record-keeping violations and wrongful termination resulting from their non-compliance of mandatory law, their violation of employee rights, privileges and protection under the law, and enforcement of Federal sanctions in this judicial forum. These rights and damages resulting cannot be waived, modified or precluded from the full protection of mandated compliance, which does impose sanctions as a matter of law, for any violations identified in an employee dispute over salary and wage matters, whether for under payments, overpayments, or employee benefits.

Defendant did further file her Motion and Memorandum, requesting this Court to reconsider the February 19, 2003 Order, and in that Memorandum, Defendant did provide authority for the Court's reference, thereby demonstrating the manner and nature by which the numerous Federal courts have ruled on the issue employment rights under the *Fair Labor Standard Act* cannot be thwarted, abridged or waived; that the *Act* cannot be construed in any narrowing manner; that the employer is responsible for "knowledge" and "management" of the *Act*; that the *Act* compels the employer (solely) to make, keep and preserve accurate employee wage records; that under no circumstance or condition, and at no time, or for any reason, may the employer transfer or attempt to transfer any responsibility under the *Act* to the employee; that any failure of the employer to comply with any provision of the *Act* will be at the employer's own peril, and it does make the employer subject to ramifications and sanctions.

Defendant further supplemented her Motion and Memorandum for reconsideration on April 8, 2003 with

additional documentary authority to support her Motion, which served to confirm Ada County was knowingly in violation of FLSA, and has been in a continuing state of non-compliance for a period of years, and the County Commissioners, in the last administration, after Defendant's termination, were attempting to come into compliance with the *Act* by January 10, 2002.

On April 18, 2003 the Court entered an Order Denying Defendant's Motion to Reconsider. The Court's ruling in this case is absent Findings of Fact and Conclusions of Law, as may otherwise be required in accordance with Rule 52 (a) I.R.C.P., as some factual finding had to be made in order to find this Defendant will not be allowed due process and enforcement of the provisions under FLSA. The entry of Findings and Conclusions would have been beneficial to the parties to clarify any thought on the issues as may be presented for appellate review.

CASE AUTHORITY

The Idaho Supreme Court stated in Kindred v. Amalgamated Sugar Co., 118 Idaho 147, 794 P.2d 309 (1990):

> "Under I.A.R. 12, a party may seek permission to appeal from an interlocutory order which is not otherwise appealable as a matter of right under I.A.R. 11 (d). Generally, an appeal under I.A.R. 12 will be permitted when the order involves a controlling question of law as to which there is substantial grounds for difference of opinion and that an immediate appeal may materially advance the orderly resolution of the

litigation. *Budell v. Todd*, 105 Idaho 2, 665 P.2d 701 (1983)."

The United States Congress adopted the *Fair Labor Standards Act*, 29 U.S.C. § 201 *et seq*. in 1938, as remedial legislation to address employment disputes over wages, pay, salaries and discriminatory, retaliatory and capricious terminations resulting from wage and record-keeping disputes over hours worked and payment of wage to employees. It is a question of law under the facts of this case, the courts have previously and consistently determined any attempt to impose restrictive interpretation of the *Act* is contrary to that congressional intent. See Lamon v. City of Shawnee, Kan., 754 F.Supp. 1518 (D.Kan 1991). All employment subject to the *Fair Labor Standards Act* must be construed to include all rights and all terms of the Act. See Manseau v United States, 52 F Supp 395(DC Mich., 1943); Walling v McKay, 70 F Supp 160 (DC Neb., 1946), affd (CA8 Neb) 164 F2d 40; Orminski v Hyland Electrical Supply Co., 326 Ill App 392, 62 NE2d 14 (1945). No party can attempt to limit the scope of the *Fair Labor Standards Act*. See Kappler v Republic Pictures Corp., 59 F Supp 112 (DC Iowa, 1945), affd (CA8 Iowa) 151 F2d 543, 162 ALR 228, affd 327 US 757, 90 L Ed 991, 66 S Ct 523, reh den 327 US 817, 90 L Ed 1040, 66 S Ct 804. The Federal courts have remained firm on the content of the entire enactment to protect the employee against abuse of process that could affect any of the rights and duration of employment.

An employee is protected even when he communicates to the employer of the failure to perform their mandatory duty (e.g. accurate record-keeping) under the *Act*. Because the employee is protected at all times, under § 215 (a)(3) of the *Act*, the employer will be considered in violation of the *Act* if any adverse action is taken against the employee, such as

termination over wage overpayments caused from inadequate record-keeping procedures, as that would result in the potential of discriminatory misconduct. In short, an employee who "complains" to their employer about the employer's violations of FLSA, such as administrative errors due to improper, incorrect or inaccurate wage and salary record-keeping, is protected from discriminatory treatment, retaliatory treatment, punishment or termination under § 215 (a)(3) of the *Fair Labor Standards Act*. That is the situation we have here, as Ms. Gibson had complained about the errors each pay period, during her early tenure with Ada County, and ultimately decided to live with their errors, only to thereafter become subject to discipline from their administrative errors, as they fired her over a subsequent series of events where the County caused excessive wage deposits to her account, and said it was then somehow her fault for not being aware of it or reacting to it, apparently despite the fact Ada County controls all aspects of payroll, records, deposits and debits to any direct deposit account with any employee, and they generated the pay voucher and put their own figures on it, including her described base salary of $1,550.00 (should have been (1,575.00).

In Hageman v. Park West Gardens, 480 N.W.2d 223 (N.D. 1992, citing the Federal District Court decision in Brennan v. Maxey's Yamaha, Inc., 513 F.2d 179, 180 (8th Cir. 1975), the North Dakota Supreme Court made the following relevant discussion:

> "The Fair Labor Standards Act "prohibits discrimination against an employee who asserts or threatens to assert his or her FLSA rights."

Appendix 31

> "Where the immediate cause or motivating factor of a discharge is the employee's assertion of statutory rights, the discharge is discriminatory under [29 U.S.C.] § 215 (a)(3) whether or not other grounds for discharge exist. Goldberg v. Bama Manufacturing Corp., 302 F.2d 152 (5th Cir. 1962); Mitchell v. Goodyear Tire & Rubber Co., 278 F.2d 562 (8th Cir. 1960)."

The North Dakota Supreme Court stated "Thus, where an employee is fired and the termination is motivated in any part by the employee's assertion of rights under the Act, such termination is deemed discriminatory." See also Martin v. Gingerbread House, Inc., 977 F.2d 1405, 1408 N. 4 (10th Cir. 1992) and Love v. RE/MAX of America, Inc., 738 F.2d 383, 387 (10th Cir. 1984).

The *Fair Labor Standards Act* is deliberate and specific, and requires the employer to keep accurate records showing whether the employer (Ada County) is being compliant with FLSA, and this record-keeping activity is an appropriate means to a legitimate end, especially since these records are considered to be *quasi*-public in character. In one of the earliest case assessments involving FLSA record-keeping, Walling v. De Soto Creamery & Produce Co., 51 F. Supp. 938 (DC Minn. 1943), the court made the following conclusion of law:

> "By failing to keep true records of the hours worked each work day and each workweek by each of its employees, and by making or causing to be made arbitrary, fictitious and false entries, purporting to reflect the hours worked

> each day and each workweek by each of its employees, the regular rate of pay, the regular straight time earnings, and the additional overtime earnings of many of its employees as above stated, the defendant has violated the provisions of Sections 11 (c) and 15 (a)(5) of the Act."

When Stacy Gibson denied the contentions and allegations of any misconduct, as was alleged by agents of the Ada County Sheriff, Vaughn Killeen, on July 20, 1999 (during two (2) interrogations), and thereafter on two (2) more separate occasions, being August 6, 1999 and again on September 27, 1999, Ms. Gibson had again expressed her concerns, and in doing so, asserted her rights over these administrative errors, and the resulting actions taken from her complaints about the record-keeping errors was forthcoming in the form of wrongful threats to her employment, and we must conclude, in accordance with the 9th Circuit Court's decision in Lambert v. Ackerley, *supra* and E.E.O.C. v. Romeo Community Schools, *supra*, that Ms. Gibson has formally and repeatedly asserted her employment rights under all provisions of the *Fair Labor Standards Act*, including the fact Ada County personnel had created and perpetuated the administrative error (incorrect and/or inaccurate FLSA record-keeping), which was the only basis for the threat of prosecution and threat of discipline, and basis for retaliatory conduct and Stacy's resulting termination. Ms. Gibson had no participation or involvement in any of the County's mandatory FLSA record-keeping process, she knew nothing of the error, and she was not a participant in the disbursement of any overpayment of wages that resulted in her mistaken receipt of money in the joint checking account with her husband. The County also had the exclusive right to debit

the account at any time, as agreed by the terms of the voluntary direct deposit pay program.

There was no basis for any "criminal investigation" as Ms. Gibson had no say in Ada County violating their mandatory record-keeping duty and obligation under the terms and provisions of FLSA (late October 1998 through July 1999). The County ascertained their administrative error on July 19, 1999, and thereafter proceeded to interrogate Ms. Gibson, at which time, and several times thereafter (while still an Ada County employee), she expressed her attitude over their errors, and abuse of her rights, and voiced her concerns, and did assert her employment rights and the statutory protection provided to her by the terms and conditions of FLSA. Any action taken by the County, beginning July 20, 1999, and all times thereafter, must be viewed as retaliatory FLSA violations, as addressed by Lambert v. Ackerley, 180 F.3d 997 at 1007-1008 (9th Cir. 1998), E.E.O.C. v. Romeo Community Schools, 976 F.2d 985 at 989 (6th Cir. 1992), Hageman v. Park West Gardens, Brennan v. Maxey's Yamaha, Inc., *supra*, and Walling v. De Soto Creamery & Produce Co., *supra*.

CONCLUSION

Defendant does believe the current state of the issues presented as a result of these orders are of a significant and substantial legal concern, of great public interest, and involve a controlling question of law on the issues of employee rights, privileges, protections and what is expected of an FLSA affected employer who remains knowingly out-of-compliance of the mandatory law, in violation of the Federal enactment and of its own County Code requirements, and then disregards its own administrative errors caused from the record-keeping violations, and disregards the pay reduction provision

Appendix 31

mandated in its own County Personnel System, and then discriminates against a loyal – never once disciplined – employee, by the retaliatory, arbitrary and capricious termination of such a dedicated employee, because of the voiced attitude over their pay voucher errors. We are confronted with an employer who believes it is above the law and can conduct this course of conduct with impunity. Defendant respectfully requests the Court to enter an Order approving her Motion to Appeal by Permission and seek determination from the Appellate Court concerning Defendant's rights to due process of law by the use of the FLSA legislation as a defense and a cause of action.

Dated This 16th day of May 2003.

s/ Vernon K. Smith
Vernon K. Smith
Attorney for Defendant/Counterclaimant

APPENDIX 32 – [GIBSON] MOTION PERMISSION TO APPEAL FROM DISTRICT COURT'S INTERLOCUTORY ORDER ENTERED FEBRUARY 19, 2003 BY JUDGE RONALD J. WILPER, FOURTH DISTRICT COURT (DOCKET NO. 31553), FILED MAY 2, 2003

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

Case No. CV OC 0107394D

MOTION FOR PERMISSION TO APPEAL FROM DISTRICT COURT'S INTERLOCUTORY ORDER ENTERED FEBRUARY 19, 2003

Filed: May 2, 2003

ADA COUNTY,

Plaintiff/Counterdefendant,

vs.

STACY A. GIBSON,

Defendant/Counterclaimant.

COMES NOW The Defendant/Counterclaimant above-named, through counsel, Vernon K. Smith, and pursuant to Rule 12, I.A.R., and Rule 7 (b)(3), I.R.C.P., does request this Court to enter an order to grant Defendant permission to appeal the District Court's interlocutory order entered February 19, 2003 to the Idaho Supreme Court, upon the controlling question of the application of the *Fair Labor Standards Act*

(FLSA) as a claim to be raised by Defendant as a defense and as a counterclaim regarding the rights of Defendant and the violation of those rights, resulting in the inadequate wage and record-keeping procedure that caused the administrative error and overpayment of Defendant's salary into a joint checking account under the direct deposit system used by the County, resulting in Defendant's mistaken receipt of funds from the County's negligence and violation of the FLSA provision announced in 29 U.S.C. § 211 (c). Defendant does contend the subject matter does involve a controlling question of law, and the current District Court Order does preclude Defendant, contrary to existing Federal case law, from properly defending and advancing her cause of action as provided for in her Amended Counterclaim and subsequent pleadings to be processed in the Court.

Defendant filed her Answer, Affirmative Defenses and Counterclaim in this case on May 7, 2002, therein providing detailed facts surrounding Defendant's employment and the protection and rights afforded to her under the terms, conditions and provisions of the Ada County Code, County Personnel System, § 1-7-1 through § 1-7L-10 and specifically the Federal protection laws concerning employment, entitled the *Fair Labor Standards Act*, 29 U.S.C. § 201 *et seq.*, and applied to Defendant's employment under the provisions of Federal law and by the specific language in the Ada County Code, § 1-7C-1. On July 11, 2002, Defendant requested this Court to allow her to amend her counterclaim to more specifically describe the detail in support of her allegations as the manner in which Ada County and the Ada County Sheriff's Office had violated her rights and the provisions of the *Fair Labor Standards Act*, 29 U.S.C. § 211 (c), and the consequence of those violations resulted in the mistaken receipt of funds, and was then made the unlawful basis and foundation used by

the County to wrongfully terminate Defendant, all of which was caused by and resulted from the erroneous wage and record-keeping process of the Ada County Sheriff's Office and Ada County Payroll Department, due to the flawed accounting process used back then and in effect by the County, before the events of non-compliance were made a major concern and administrative efforts taken to come into compliance with the Federal mandates.

That the United States Congress adopted the *Fair Labor Standards Act*, 29 U.S.C. § 201 *et seq.* in 1938 as remedial legislation to prevent employment disputes over wages, pay, salaries and discriminatory and capricious terminations resulting from wage and record disputes over hours worked and payment of wage to employees. Accordingly, the courts have previously and consistently determined any attempt to impose restrictive interpretation of the *Act* is contrary to that congressional intent. For example, see Lamon v. City of Shawnee, Kan., 754 F.Supp. 1518 (D.Kan 1991). Furthermore, **all employment** subject to the *Fair Labor Standards Act*, must be construed to include all rights and **all terms** of the Act. See Manseau v United States, 52 F Supp 395(DC Mich., 1943); Walling v McKay, 70 F Supp 160 (DC Neb., 1946), affd (CA8 Neb) 164 F2d 40; Orminski v Hyland Electrical Supply Co., 326 Ill App 392, 62 NE2d 14 (1945). No parties can attempt to limit the scope of the *Fair Labor Standards Act*. See Kappler v Republic Pictures Corp., 59 F Supp 112 (DC Iowa, 1945), affd (CA8 Iowa) 151 F2d 543, 162 ALR 228, affd 327 US 757, 90 L Ed 991, 66 S Ct 523, reh den 327 US 817, 90 L Ed 1040, 66 S Ct 804. The Federal courts have remained firm on these issues of application and reliance on the content of the entire enactment to protect the employee against any abuse of process that could affect the rights and duration of employment.

Appendix 32

On February 19, 2003, the Court signed an Order (prepared by the counsel for Ada County) denying Defendant's Motion to Dismiss the County's case, and the Court further ordered "that Defendant's Motion to Amend Counterclaim, which sought to include an additional cause of action under the Fair Labor Standards Act, 29 U.S.C. § 211 (c), is denied", the effect of which is to deny Defendant due process of law, and allow the County's abuse of process and FLSA violations to escape judicial review and imposition of appropriate sanctions for their wage and record-keeping violations and wrongful terminations resulting from their own non-compliance of mandatory law, and violations of employee rights, privileges and protection that cannot be waived, modified or precluded from the full protection of mandated compliance, which does impose sanctions as a matter of law, for any violations identified in the employee dispute over salary and wage matters, whether for under payments, overpayments, or employee benefits.

Defendant did timely file her Motion and Memorandum, requesting this Court to reconsider the Court's February 19, 2003 Order, and in her Memorandum, Defendant did provide case authorities for the Court's reference, thereby demonstrating the manner and nature by which the numerous Federal courts have ruled (1) employment rights under the *Fair Labor Standard Act* cannot be thwarted, abridged or waived; (2) the *Act* cannot be construed in any narrowing manner; (3) the employer is responsible for "knowledge" and "management" of the *Act*; (4) the *Act* compels the employer (solely) to make, keep and preserve accurate employee wage records; (5) under no circumstances or conditions, at no time, for any reason, may the employer transfer or attempt to transfer any responsibility under the *Act* to the employee; and (6) any failure of the employer to comply with any provisions of the

Act will be at the employer's own peril, and places the employer in instant violation of the *Act*, subject to ramifications and sanctions. Defendant further supplemented her Motion and Memorandum for reconsideration on April 8, 2003 with additional documentary authority in support of her Motion, all of which confirmed Ada County is knowingly in violation of FLSA, and has been in a continuing state of non-compliance for years, and the County Commissioners, in this new administration, after Defendant's termination, was attempting to come into compliance no later than January 10, 2002. On April 18, 2003 the Court entered an Order Denying Defendant's Motion to Reconsider. The Court's ruling in this case was thereupon absent of any entry of Findings of Fact and Conclusions of Law, as required by and in accordance with Rule 52 (a) I.R.C.P., as some factual finding had to be made to provide Defendant the due process she is entitled under FLSA. The entry of such Findings and Conclusion are helpful especially for purposes to clarify the issues presented for appellate review.

Defendant does believe state of the issues presented as a result of these orders are of a significant and substantial legal concern, of great public interest, and involve a controlling question of law on the issues of employee rights, privileges, protections and what is expected of an FLSA affected employer who remains knowingly out-of-compliance of the mandatory law, in violation of the Federal enactment and of its own County Code requirements, and then disregards its own administrative errors caused from the record-keeping violations, and disregards the pay reduction provision mandated in it own County Personnel System, and then discriminates against a loyal – never once disciplined – employee, by an arbitrary and capricious termination of a dedicated employee, believing it is above the law and can

Appendix 32

conduct this course of conduct with impunity. Defendant respectfully requests the Court to enter an Order approving this Motion to Appeal by Permission and seek determination from the Appellate Court concerning Defendant's rights to due process of law.

Defendant will submit her supporting brief, issues and memorandum within fourteen (14) days of the filing date of this Motion, as provided for by Rule 7 (b)(3) I.R.C.P., therein setting forth the requested relief for the concerns raised.

Dated This 2nd day of May 2003.

s/ Vernon K. Smith
Vernon K. Smith
Attorney for Defendant/Counterclaimant

APPENDIX 33 – ORDER OVERRULING OBJECTION TO PROPOSED JUDGMENT ENTERED BY JUDGE RONALD J. WILPER, FOURTH DISTRICT COURT (DOCKET NO. 29694), FILED MARCH 5, 2003

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

Case No. CVOC02-05601D

ORDER OVERRULING OBJECTION TO PROPOSED JUDGMENT

Filed: March 5, 2003

STACY A. GIBSON,

Plaintiff,

vs.

ADA COUNTY, et al,

Defendant.

The Objection to the Proposed Order and Judgment is overruled.

IT IS SO ORDERED.

3-5-03
Date

s/ Ronald J. Wilper
Ronald J. Wilper
District Judge

APPENDIX 34 – [GIBSON] OBJECTION TO PROPOSED ORDER AND JUDGMENT, FILED FEBRUARY 19, 2003

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

Case No. CV OC 0205601D

OBJECTION TO PROPOSED ORDER AND JUDGMENT

Filed: February 19, 2003

STACY A. GIBSON,

Plaintiff,

vs.

ADA COUNTY, a political subdivision of Idaho; ADA COUNTY SHERIFF'S OFFICE; VAUGHN KILLEEN, acting individually and in his official capacity under color of State Law as Ada County Sheriff; R. MONTE MACCONNELL, acting individually and in his official capacity under color of State Law as Legal Advisor to the Ada County Sheriff; ARVILLE GLENN, acting individually and in his official capacity under color of State Law as a law enforcement official for Ada County under the Sheriff; SCOTT JOHNSON, acting individually and in his official capacity under color of State Law as a law enforcement official for Ada County under the Sheriff; and DOES I thru X,

Defendants.

COMES NOW The Plaintiff above named, through counsel, and does herewith object to the proposed "Order and

Judgment" submitted by Ada County under the cover letter of January 27, 2003, for the reasons and upon the grounds as follows:

1. Though Plaintiff disagrees wholly with the Court's decision, the content of any Order entered by this Court cannot exceed the subject matter relied upon and before it. This Court did not address the merits of Plaintiff's Title 42 Civil Rights claim; it only decided the application of the Court's perception of the statute of limitations and accrual of the action. This case was filed as a Title 42 Civil Rights action; this Court concluded (accepting the County's argument) Plaintiff had exhausted her administrative remedies by not later than February 15, 2000, and this Court concluded her cause of action accrued on that date (according to the County's argument) and therefore the two (2) year statute of limitations, § 5-218, Idaho Code, would have run on her pending claim as alleged in this case, based upon the time frame in filing this action. This "conclusion" as set forth above is based upon the "reasoning" we must assume the Court accepted as submitted by Ada County, thought it has not anywhere been declared by the Court as any Finding of Fact or Conclusion of Law, as is required, unless otherwise waived, by the parties. Assuming the Court intended to make such a Finding and Conclusion utilizing the reasoning of the County, it is limited to the time filing in this case only, and an order dismissing Plaintiff's Complaint must be **without** prejudice, as Plaintiff does have the right to file her Title 42 Civil Rights action within the framework of an Amended Counterclaim in that action currently pending before this Court, entitled Ada County v. Gibson, Case No. CV OC 0107394D, in which case, Ada County filed suit against Defendant, Stacy A. Gibson, seeking reimbursement of funds mistakenly paid to her through a direct deposit by the Ada County Payroll Department, based upon an

administrative error in her salary, the result of improper record keeping, a violation of the Federal *Fair Labor Standards Act* and events giving rise to a Title 42 Civil Rights action. In that action, Ms. Gibson filed her Answer and her First Counterclaim, reserving the right to file further pleadings as deemed appropriate. Within the framework of the factual background and subject matter alleged by Ada County, Ms. Gibson does have both a permissive as well as a compulsory counterclaim to file, pursuant to Rule 13 (a) and Rule 13 (b), I.R.C.P, and Ms. Gibson does have the right to amend her pleadings pursuant to Rule 15 I.R.C.P. which must be liberally construed to allow all of the issues to be raised fully before the Court for a proper disposition upon the merits. That pursuant to such an amendment, it does relate back in time to the filing of Ada County's suit, well within the two (2) year period of limitations, under this Court's perception the administrative rights were exhausted on February 15, 2000, and not still engaged in the exhaustion process under the *Idaho Administrative Procedures Act*. It is Ms. Gibson's position that her Amended Counterclaim in the above referenced pending action will be filed forthwith, and will relate back to the timing in which the County filed their suit, November 7, 2001, thereby constituting a "timely" filing of a Title 42 Civil Rights action, pursuant to the "reasoning" utilized by this Court in determining Ms. Gibson's cause of action accrued on February 15, 2000, when her administrative remedies were fully pursued and "exhausted" on that date.

Therefore, this Court cannot enter an order dismissing the above action "with prejudice" as that would inappropriately limit Ms. Gibson's right to pursue her cause of action in the other suit currently pending before the Court, as provided by the Rules of Civil Procedure.

Appendix 34

Furthermore, Plaintiff does intend to pursue an appellate review of the reasoning announced in this Court's decision, including any Finding of Facts and Conclusions of Law, and it is important to have a clear, complete and accurate record from this Court for review, including this Court's entry of appropriate Findings of Fact, Conclusions of Law and a dismissal Order, limited to the specific issue of the statute of limitations, accrual of action, and the exhaustion of administrative remedies.

Dated this 16th day of February 2003.

s/ Vernon K. Smith
Vernon K. Smith
Attorney for Plaintiff

APPENDIX 35 – ORDER AND JUDGMENT ENTERED BY JUDGE RONALD J. WILPER, FOURTH DISTRICT COURT (DOCKET NO. 29694), FILED FEBRUARY 19, 2003

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

Case No. CV OC 0205601D

ORDER AND JUDGMENT

Filed: February 19, 2003

STACY A. GIBSON,

Plaintiff,

vs.

ADA COUNTY, et al,

Defendant.

This matter having come before the Court for hearing on Defendant's Motion to Dismiss and the parties having appeared by their counsel of record, and the Court having considered arguments of the parties, and the Court being fully advised in the matter, and having found:

1. That a two-year statute of limitations applies to all Title 42 U.S.C., civil rights claims, and that the statute of limitations on this action expired on February 15, 2002, therefore the claims are time-barred;

Appendix 35

2. That to the extend Plaintiff seeks relief under a tort theory, Plaintiff did not file a notice of tort claim, which is a condition precedent to bringing a tort action against Defendants; and

3. That as to her Title 42, section 1981 claim, Plaintiff failed to allege facts to support a claim for racial discrimination;
and for other good cause appearing therefore:

NOW, THEREFORE, IT IS HEREBY ORDERED, that Defendant's Motion to Dismiss is granted and Plaintiff's action against all Defendants is dismissed in its entirety with prejudice, and that pursuant to Rule 56, I.R.C.P., summary judgment is hereby granted in favor of Defendants.

DATED this 15 day of Feb. 2003.

s/ Ronald J. Wilper
Ronald J. Wilper
District Judge

APPENDIX 36 – ORDER ENTERED FEBRUARY 19, 2003 BY JUDGE RONALD J. WILPER, FOURTH DISTRICT COURT (DOCKET NO. 31553), FILED FEBRUARY 19, 2003

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

Case No. CV OC 0107394D

ORDER

Filed: February 19, 2003

ADA COUNTY,

Plaintiff,

vs.

STACY A. GIBSON,

Defendant.

This matter having come before the Court on Defendant's Motion to Dismiss, and the parties having appeared by their counsel of record, and the Court having considered arguments of the parties, and the Court being fully advised in the matter, and the Court having found that none of the bases under which Defendant brought her Motion to Dismiss are applicable in this action;

NOW, THEREFORE, IT IS HEREBY ORDERED, that Defendant's Motion to Dismiss is denied;

Appendix 36

IT IS FURTHER ORDERED, that Defendant's Motion to Amend Counterclaim, which sought to include an additional cause of action under the Fair Labor Standards Act, 29 U.S.C. § 211 (c), is denied.

DATED this 15th day of Feb. 2003.

s/ Ronald J. Wilper
Ronald J. Wilper
District Judge

APPENDIX 37 – LETTER FROM ADA COUNTY BOARD OF COMMISSIONERS DATED JULY 2, 2003, DENYING PETITIONER THE RIGHT TO A DUE PROCESS HEARING TO ADDRESS THE WRONGFUL TERMINATION OF HER CLASSIFIED EMPLOYMENT

July 2, 2003

Vernon K. Smith
Attorney at Law
1900 W. Main Street
Boise, ID 83702

RE: Petition for Hearing and Review – Stacy A. Gibson

Dear Mr Smith:

On June 4, 2003, this office received a document entitled "Petition for Hearing and Review of Staff (Ada County Personnel Hearing Officer) Recommendation for Employment Termination of Stacy A. Gibson, Ada County Jail Technician." This Board is unable to hold a hearing as requested on page 28, paragraph 1.

The Idaho Constitution and case law make it clear that constitutionally created, county elected officials each have the sole authority to hire and fire their own deputies. A Board of County Commissioners has no legal authority to review the employment decisions of other county elected officials, including an elected Sheriff. Thus, this Board is without legal authority to review Sheriff Killeen's termination of Ms. Gibson's employment with the Ada County Sheriff's Office. *See, Barth v. Canyon County*, 128 Idaho 707 (1996).

Appendix 37

The Idaho Supreme Court decision in *Gibson v. Ada County Sheriff's Department*, Docket No. 27605, mentions an appeal of the Personnel Hearing Officer decision to the Board of County Commissioners. However, this would only apply in the instance of an employee employed under the Board of County Commissioners, rather than under a different elected official.

Additionally, this Board declines your request to employ outside counsel in this matter and has consulted with its own legal counsel to the extent necessary.

Sincerely,

Board of Ada County Commissioners

s/ Judy M. Peavey-Derr
Judy M. Peavey-Derr, Chairman

s/ Rick Yzaguirre
Rick Yzaguirre, Commissioner

s/ Fred S. Tilman
Fred Tilman, Commissioner

cc: Kelli B. Ketlinski
Patti Powell, Legal Advisor to the Sheriff

APPENDIX 38 – OPINION OF THE IDAHO SUPREME COURT, FILED MAY 28, 2003

IN THE SUPREME COURT
OF THE STATE OF IDAHO

Docket No. 27605

139 Idaho 5, 72 P.3d 845 (2003)

Boise, December 2002 Term

Filed: May 28, 2003

Rehearing Denied: July 17, 2003

Appeal from the District Court of the Fourth Judicial District, State of Idaho, Ada County. Hon. Kathryn A. Sticklen, District Judge.

The judgment of the district court is vacated and this matter is dismissed without prejudice.

Vernon K. Smith Jr., Boise, argued for appellant.

Greg H. Bower, Ada County Prosecutor, Boise, for respondent. Kelli B. Ketlinski argued.

KIDWELL, Justice.

The Ada County Sheriff's Department (ACSD) terminated Stacy Gibson (Gibson) for making material misstatements on official records, detrimental conduct, and conduct unbecoming of a county employee. Gibson sought administrative review. The county personnel hearing officer affirmed the ACSD's decision. The district court reviewed and affirmed the county

personnel hearing officer's findings of fact and conclusions of law. Gibson appeals.

I.

FACTS AND PROCEDURAL BACKGROUND

On July 23, 1997, Gibson began working for the ACSD as a Records Technician II (records tech). The ACSD paid Gibson a base salary of $1,500 per month plus overtime. Gibson made it through her probationary period and became a tenured employee terminable only for cause.

Approximately one week prior to receiving each of her paychecks, Gibson signed a pay voucher stating:

> **I STATE THAT THIS CLAIM HAS BEEN EXAMINED BY ME AND NO OTHER HOURS OR MONIES ARE DUE ME FOR OVERTIME. . . . I REALIZE SIGNING THIS CLAIM AUTHORIZES THE COUNTY TO PAY ME THE AMOUNT SHOWN AND THAT A GRIEVANCE MAY BE FILED WITHIN 5 DAYS IF I DISAGREE WITHOUT LOSS OF ANY PAY.**

In May 1998, Gibson submitted an Automatic Paycheck Deposit Authorization in order to participate in the ACSD's direct deposit program. It authorized the ACSD to "initiate credit entries and, if necessary, debit entries and adjustments for any credit entries in error to [her] account. . . ." Thereafter, Gibson did not receive a traditional paycheck. Gibson did, however, continue to receive and sign pay vouchers approximately one week prior to each payday.

Appendix 38

In fall 1998, at Gibson's request, the ACSD made her a Jail Technician II (jail tech). As a jail tech, the ACSD paid Gibson $1,550 per month plus overtime, a $50 per month increase over her base salary as a records tech. In the course of changing Gibson's pay rate, an error occurred. The error combined Gibson's base pay for the jail tech and records tech positions. As a result, beginning with her pay for November 1998, the ACSD paid Gibson her base pay for her jail tech position, $1,550, plus base pay for the records tech position, $1,500, and overtime. From November 1998 through June 1999, Gibson signed pay vouchers authorizing the ACSD to pay her $3,050, plus overtime equaling $100 to $700, per month. The ACSD paid in accordance therewith.

In June or July 1999, the ACSD discovered that it had overpaid Gibson $12,000 over the course of eight months. Believing that Gibson's act of signing pay vouchers authorizing the overpayments for eight months might constitute a crime, the ACSD assigned Detective Arvinn Glenn (Glenn) to investigate the matter.

On July 20, 1999, Glenn summoned Gibson to his office. When asked what the base salary for a jail tech was, Gibson responded that it was $1,550 per month. Then, Glenn asked Gibson what she was paid. Gibson stated, "I have no idea. I mean, I sign my cards, I never pay attention to [th]em. I work so much overtime. . . . I been putting in sixty, who knows, how many hours of overtime." Gibson also stated that she didn't ever balance her checkbook; rather, she would call the bank a couple of times a month to check her balance and avoid overdrafts. Also, when Gibson was a records tech, she carefully reviewed her pay vouchers and reported errors. After reassignment as a jail tech, however, she discontinued this practice.

Appendix 38

The ACSD concluded that Gibson had knowingly signed pay vouchers indicating that her base salary was $3,050 when she knew her base salary was only $1,550. On August 2, 1999, Sheriff Vaughn Killeen (Killeen) sent Gibson a letter expressing his intent to terminate her on the grounds that she: (1) conducted herself in a "manner as to be detrimental to the good order and discipline of the department;" (2) "made a materially misleading statement in an official report;" and (3) "conducted [her]self in such a manner as to reflect unfavorably on th[e] department and [her]self." The letter stated that the facts giving rise to Gibson's termination were: (1) she knowingly accepted salary overpayments; and (2) she did nothing to correct the overpayments or repay the monies erroneously paid to her. The letter also advised Gibson of her right to appeal.

Gibson appealed. The Ada County personnel hearing officer heard the matter on January 25 and 26, 2000. On February 17, 2000, the hearing officer's findings of fact, conclusions of law and decision affirmed Killeen's decision to terminate Gibson. The hearing officer found Gibson's conduct "detrimental to the good order and discipline in the (ACSD) department or office, or conduct unbecoming of a county employee" in violation of Ada County Code (ACC) § 1-7G-3A(5). The hearing officer also found that Gibson's conduct violated ACSD Policy Manual § 9.04 because it could bring the ACSD into disrepute. The hearing officer, however, found that Gibson did not violate ACC § 1-7G-3A(20) — allowing termination for material misrepresentations in "official reports" because the pay vouchers did not constitute "official reports."

Gibson sought judicial review of the county personnel hearing officer's decision pursuant to A.C.C. § 1-7(G)-3(o) on the grounds that she was denied due process, the hearing

officer's findings were not based on substantial, competent evidence, and the decision was arbitrary and capricious. The district court addressed the matter under the standard of review set forth in the Idaho Administrative Procedure Act (IAPA), I.C. §§ 67-5277 and -5279, and affirmed the hearing officer's decision.

Gibson timely filed this appeal.

II.

ANALYSIS

A. The Idaho Administrative Procedure Act Does Not Govern This Action.

The IAPA and its judicial review standards apply to agency actions. I.C. §§ 67-5201, -5270.

> "Agency" means each state board, commission, department or officer authorized by law to make rules or to determine contested cases, but does not include the legislative or judicial branches, executive officers listed in section 1, article IV, of the constitution of the state of Idaho in the exercise of powers derived directly and exclusively from the constitution, the state militia or the state board of correction.

I.C. § 67-5201(2). This Court has held that "[t]he language of the IAPA indicates that it is intended to govern the judicial review of decisions made by state administrative agencies, and not local governing bodies." *Idaho Historic Preservation Council v. City Council of Boise*, 134 Idaho 651, 653, 8 P.3d 646, 648 (2000); *see also Petersen v. Franklin County*, 130

Idaho 176, 182, 938 P.2d 1214, 1220 (1997); *Arthur v. Shoshone County*, 133 Idaho 854, 859, 993 P.2d 617, 622 (Ct.App. 2000). Counties and city governments are considered local governing bodies rather than agencies for purposes of the IAPA. *Idaho Historic Preservation Council*, 134 Idaho at 653, 8 P.3d at 648; *Petersen*, 130 Idaho at 182, 938 P.2d at 1220; *Arthur*, 133 Idaho at 859, 993 P.2d at 622.

Though the IAPA and its judicial review provisions are generally inapplicable to local government actions, a statute may provide for judicial review of local government actions pursuant to the IAPA. *Idaho Historic Preservation Council*, 134 Idaho at 653-54, 8 P.3d at 648-49; *see Petersen*, 130 Idaho at 182, 938 P.2d at 1220. Absent a statute invoking the IAPA's judicial review provisions, local government actions may not be reviewed under the IAPA. *Idaho Historic Preservation Council*, 134 Idaho at 653-54, 8 P.3d at 648-49.

B. A County Personnel Hearing Officer's Action Is Not Subject To Judicial Review Pursuant To I.R.C.P. 84.

Statutes may also authorize judicial review without invoking the provisions of the IAPA. I.R.C.P. 84(a)(1). The rule, however, states "actions of a local government, [or] its officers . . . are not subject to judicial review unless expressly authorized by statute." I.R.C.P. 84(a)(1). There is no statute authorizing judicial review of a decision by the county personnel hearing officer. Therefore, this matter is not subject to review pursuant to I.R.C.P. 84.

Idaho Historic Preservation Council might appear, at first glance, to support application of the general standards of judicial review found in I.R.C.P. 84(a)(1) to this matter. *Idaho Historic Preservation Council* is, however, distinguishable

from this case. In *Idaho Historic Preservation Council*, the council petitioned for review of a decision of the Boise city council. 134 Idaho at 652, 8 P.3d at 647. The district court determined that the IAPA provided the correct standard of review for the matter. *Id.* This Court found that the IAPA was inapplicable, nonetheless it proceeded to review the matter using the generally applicable standards of review under I.R.C.P. 84(a)(1). *Id.* The distinction between this matter and *Idaho Historic Preservation Council* was that the Idaho Preservation of Historic Sites Act, the controlling law in *Idaho Historic Preservation Council*, expressly authorized judicial review. *See* I.C. § 67-4610. In the present matter, there is no statute authorizing judicial review. Without such a statute, the approach in *Idaho Historic Preservation Council* is inapplicable.

Notably, had Gibson appealed the county personnel hearing officer's decision to the Ada County Board of Commissioners (board), the board's decision would be an appropriate subject for judicial review and the IAPA standard of review would apply. I.C. § 31-1506(1). Without action of the board, however, the judicial review provisions of I.C. § 31-1506(1) are inapplicable.

C. A County Ordinance Cannot Authorize Judicial Review.

ACC § 1-7G-3(o) states that a party may "appeal the decision" of the hearing officer "to the District Court of the Fourth Judicial District. . . ." Notably, this reference to "appeal" comes after an explicit reference to the IAPA in ACC § 1-7G-3(m). Thus, read in context, the reference to "appeal" in ACC § 1-7G-3(o) contemplates judicial review under the IAPA.

Appendix 38

Whether ACC 1-7G-3(o) may authorize judicial review pursuant to the IAPA depends on whether the County was empowered to make such a law. Article XII, § 2 of the Idaho Constitution and I.C. § 31-604 govern a county's power to make law. Article XII, § 2 states: "Any county . . . may make and enforce, within its limits, all such local police, sanitary and other regulations as are not in conflict with its charter or with the general laws." The appeal provision of ACC 1-7G-3(o) does not appear to be a "police, sanitary [or] other regulation" as the terms are used in the Idaho Constitution. Additionally, the IAPA judicial review provisions apply only to agency decisions. The Legislature has defined "agency" to exclude decisions made by county hearing officers. I.C. § 67-5201(2); *Idaho Historic Preservation Council*, 134 Idaho at 653, 8 P.3d at 648; *Petersen*, 130 Idaho at 182, 938 P.2d at 1220; *Arthur*, 133 Idaho at 859 993 P.2d at 622. Thus, any attempt by the county to authorize judicial review of a personnel hearing officer's decision is infirm because it conflicts with the general laws of this State.

ACC 1-7G-3(o) also cannot authorize judicial review pursuant to I.R.C.P. 84. Rule 84 requires that a statute authorize judicial review ACC 1-7G-3(o) is not a "statute" within the meaning of I.R.C.P. 84 and thus cannot authorize judicial review. Because ACC 1-7G-3(o) is not a statute, yet it attempts to authorize judicial review of a personnel hearing officer's decision, it conflicts with I.R.C.P. 84 and is, therefore, infirm.

D. This Case Is Not Appropriate For Remand Because Gibson's "Notice Of Appeal Of Decision Of Ada County Personnel Hearing Officer" Cannot Be Read As A Complaint.

Appendix 38

In *Gillespie v. Mountain Park Estates L.L.C.*, this Court recently stated:

> Generally, a claim for relief need contain only a short and plain statement of the claim showing that the pleader is entitled to relief. . . . A party's pleadings should be liberally construed to secure a just, speedy and inexpensive resolution of the case. With the advent of notice pleading, a party is no longer slavishly bound to stating particular theories in its pleadings. Rather, a complaint need only state claims upon which relief may be granted. . . . The emphasis . . . is to insure that a just result is accomplished, rather than requiring strict adherence to rigid forms of pleading.

2002 WL 31260036 at *2 (2002) (internal citations and quotations omitted); I.R.C.P. 8. The key issue in determining the validity of a complaint is whether the adverse party is put on notice of the claims brought against it. *Id.* at *3.

Though this Court will make every intendment to sustain a complaint that is defective, e.g., wrongly captioned or inartful, a complaint cannot be sustained if it fails to make a short and plain statement of a claim upon which relief may be granted. Here, even read broadly, Gibson's "notice of appeal" filed with the district court fails to provide notice of any claim against the ACSD other than a claim for judicial review of the hearing officer's decision. Thus, this court cannot sustain it as a complaint under I.R.C.P. 8.

E. The ACSD Is Not Entitled To Attorney Fees Or Costs On Appeal.

The ACSD has not prevailed on the merits in this matter. In fact, it is the infirm appeal provision of A.C.C. § 1-7G-3(o), incorrectly instructing Gibson to appeal the decision of the county personnel hearing officer to the district court, which has prevented this Court from addressing the merits of this matter. As a result, the matter is dismissed *without prejudice* and the ACSD is not a prevailing party entitled to attorney fees or costs on appeal.

III.

CONCLUSION

Decisions of a county personnel hearing officer are not subject to judicial review pursuant to IAPA or any other statutory provision. A county ordinance cannot authorize judicial review of a county personnel hearing officer's decision because such an ordinance is infirm under Article XII, § 2 of the Idaho Constitution and I.C. § 31-604. Gibson's "notice of appeal" seeking judicial review is not appropriate for remand because it is insufficient to place the ACSD on notice of any claims against it on which Gibson may have been granted relief, aside from judicial review. Thus, this matter is dismissed without prejudice.

No attorney fees or costs are awarded.

Chief Justice TROUT and Justices SCHROEDER, WALTERS, and EISMANN concur.

APPENDIX 39 – AFFIDAVIT OF FORMER ADA COUNTY COMMISSIONER, SHARON M. ULLMAN, DATED JANUARY 30, 2003, VERIFYING ADA COUNTY'S ONGOING FLSA NONCOMPLIANCE AND NEED TO ADDRESS THE MATTER

AFFIDAVIT OF SHARON M. ULLMAN

STATE OF IDAHO)
:ss
COUNTY OF Ada)

COMES NOW Sharon M. Ullman, former Ada County Commissioner, District I, and being first duly sworn upon oath, deposes and says as follows:

1. That Affiant was duly elected to the Board of Commissioners (Board), District I seat, Ada County, Idaho in November 2000; that Affiant took office on January 8, 2001; that Affiant's last full day in office was January 12, 2003.

2. That Affiant presents this Affidavit upon her own knowledge, direct conversations and personal participation with Ada County officials, and in conjunction with her official duties as an Ada County Commissioner, District I seat, Ada County, Idaho.

3. That Affiant has personal knowledge of Idaho Code, § 31-801 *et seq.*, which defines the Powers and Duties of the Board of Ada County Commissioners; that Affiant was a member of that Board; that in accordance with that statute, § 31-816, Idaho Code, the Board is required, "To fix the compensation of all county officers and employees, and provide for the payment of the same".

4. That Affiant has personal knowledge of Idaho Code, § 31-809, which requires the Board "To examine and audit the accounts of all officers having the care, management, collection or disbursement of moneys belonging to the county, or appropriated by law, or otherwise, for its use and benefit."

5. Affiant has personal knowledge of Idaho Code, § 31-810, wherein the Board is required to pay claims against the County, and those claims do include compensation for all County employees for wages, salaries, overtime, compensatory time, flexible time, and all other disbursements relating to Ada County employment.

6. That Affiant would state that to the best of Affiant's knowledge, and based upon controlling Federal and State law, Ada County is an employer pursuant to and controlled by the provisions of the *Fair Labor Standards Act* (FLSA).

7. That Affiant was informed by Theodore Argyle, Chief Civil Deputy Prosecuting Attorney for Ada County, in early 2001 that Ada County was out of compliance with various provisions of the *Fair Labor Standards Act* including such items as record-keeping requirements and overtime computation and disbursements. It was duly determined that Ada County officials were going to attempt to bring all County Departments into compliance with the *Act*.

8. Affiant did attend a seminar, along with other Ada County employees, department heads and other elected officials; this seminar was presented by Theodore Argyle and another Ada County Deputy Civil Attorney concerning the *Fair Labor Standards Act*, held at Western Town on the grounds of the Western Idaho Fair, on the 18th day of May,

2001. It was deemed to be quite important at that time to educate the County officials (including Affiant) about the need to understand and perform Ada County's FLSA obligations and responsibilities to Ada County employees. Ada County was required to discharge its duty as an FLSA employer, or face legal consequences. During this seminar, Mr. Argyle emphasized to us repeatedly there is ***no defense*** for an FLSA violation, and for that reason he stressed the need for all Ada County Departments to act in accordance with the *Fair Labor Standards Act*.

9. Affiant first became aware that Ada County, as an employer, was possibly committing FLSA violations when an Ada County employee brought the subject to my attention, approximately six or eight months prior to my taking office in January 2001. At the time the possible FLSA violations were first brought to Affiant's attention by the Ada County employee, Affiant informed the employee there was nothing I could do until I took office as an elected commissioner. Shortly after taking office, I began to question our legal staff in the Civil Division about the concern and possibility of County FLSA violations. Affiant's questions, along with the subsequent events of filing an FLSA complaint by another employee, led to the internal examination of the County's payroll practices by the legal staff.

10. Affiant cannot confirm the exact duration of time during which Ada County had been out of compliance with the *Fair Labor Standards Act*, but the County did officially recognize all Departments were in an ongoing state of FLSA non-compliance, and it was for that reason, effective no later than January 10, 2002, the County made major changes in the method and means by which the Departments would process their employee wage records, record keeping and

disbursements, and how that was to be accomplished. The changes included the long overdue removal of the mandatory signature required on a "pay voucher", or "claim form", from all of the County employees. That change made it no longer required to sign "pay vouchers" or "claim forms" since the effective date of the changes, being no later than January 10, 2002.

Dated this 30th day of January 2003.

s/ Sharon M. Ullman
Sharon M. Ullman

SWORN AND SUBSCRIBED To before me this 30th day of January 2003.

s/ Vernon K. Smith
Notary Public for Idaho
Residing at Boise, Idaho
My Commission Expires: 12/20/06

APPENDIX 40 – MEMORANDUM REGARDING NEW PAYROLL SYSTEM FROM ADA COUNTY SHERIFF, VAUGHN KILLEEN, TO ALL SHERIFF'S OFFICE PERSONNEL, DATED JANUARY 9, 2002

MEMORANDUM

DATE: January 9, 2002

TO: All Personnel

FROM: Sheriff Vaughn Killeen

SUBJECT: Payroll Update

As you are all aware, we began a new payroll system on December 16. While the intent was noble and meant for the benefit of the employees, the transition to it has been rather problematic. We are trying to overcome the issues, but until then I wanted to clarify what you can expect.

- Everyone is now an hourly employee and will receive a check every other Friday, beginning January 11. That check will include the exact number of hours you worked in the prior pay period (December 16 – December 29 was the first one) and any paid overtime accrued during that period. Because you are now paid hourly, it is very important that you make sure all of your hours are recorded. If there is pre-approved administrative leave time, such as when you attend training for 8 hours and your shift would have been 10, the approved number of hours are entered. If only 8 hours are recorded for that day, you will be two hours short in your paycheck.

Appendix 40

- Two great benefits that are being added because of this. The first is that the County is paying you twice for December 16 through December 29. You already received a full paycheck for December and are going to get paid again for those two week on January 11. In reality though, you won't have the extra money in hand until you terminate your employment because you will receive a check after termination that you would not have received otherwise. The second benefit is that when you exceed the maximums on sick time and vacation time, those hours now roll over to the Post Employment Health Program and pay insurance premiums after you terminate your employment. Sick time rolls at 40% of value and vacation time at 100%. With the rising costs of health care, this is a great enhancement to our benefit plan.

- Your normal benefit time (vacation, sick and holiday) and your compensatory time will print out with your check, but it will not be accurate. The Finance Office will distribute a Monthly Time Report along with the checks. That record should be accurate and that is the one to check.

We are striving to work the bugs out of the new system. Until that time, please be patient and realize that we have no control over most aspects of this system. If you have questions about timekeeping, please contact your supervisor and proceed through your chain of command if possible. If they remain unresolved or if your paycheck is obviously incorrect, please contact Geneva Usog at 6787 or Kelli Bolicek or 6701.

APPENDIX 41 – LETTER FROM THE ADA COUNTY PROSECUTOR'S OFFICE TO THE BOARD OF ADA COUNTY COMMISSIONERS DATED FEBRUARY 12, 2001, REGARDING NEED FOR COUNTY COMPLIANCE WITH FLSA

CONFIDENTIAL ATTORNEY-CLIENT COMMUNICATION

February 12, 2001

ADVICE NO. W-8712

Board of Ada County Commissions
650 Main Street
Boise, Idaho 83702

RE: FLSA Compliance and Payroll Change

Dear Commissioners:

Attached to this letter is a table listing five different options and the material consequences of each for our discussion about FLSA compliance and payroll periods tomorrow morning.

The workgroup that has been studying the issue recommends Option #2 be implemented, either at the commencement of the new fiscal year or at the commencement of the new calendar year concurrent with move in at the new courthouse.

I believe that Dave Navarro and Terry Johnson will be present to provide further information on payroll, accounting, and personnel consequences for use in your deliberations on the matter.

Appendix 41

We will also discuss the implications of FLSA compliance as it relates to each of these options. These particulate discussions involve liability and should be done in executive session.

Very truly yours,

GREG H. BOWER
Ada County Prosecuting attorney at law

By: Theodore E. Argyle
Chief Civil Deputy

TEA:kks

Enclosure

Appendix 41

PAYROLL AND FLSA COMPLIANCE OPTIONS WHITE PAPER

OPTION #1
Full Compliance and Standardization
(The Perfect Legal World)

Proposal	Advantages	Disadvantages	Potential Costs to Implement	Comments
Hourly Employees. All hourly employees turn in time and are paid an hourly wage for the number of hours worked.	Solves all current FLSA compliance issues. Always pay the right amount and sick and vacation are accurate. Can be automated. Saves retroactive adjusting time. Can add time and attendance which is currently an issue.	Every department and division will have to keep track of hours worked.	Payroll programming and a timekeeping system. Approximately 1 month to reprogram to add time and attendance.	We should be doing this anyway. We are not in complete technical compliance with FLSA.
Overtime. Eliminate the 7K exemption Countywide. Overtime is computed after forty hours per week.	Simple, easy to use rule that all departments and divisions can follow. Training is easy.	Disrupts law enforcement and other security cultures.	Additional pay for detention overtime. Probably no extra for the Sheriff since he pays OT after 10 hours each day.	Only two rules to program and learn.
Pay Period. 26 pay periods per year lagging time earned by 2 weeks.	Helps retain lower wage entry level employees where turnover is highest	Some additional expense to process.	Additional processing cost absorbed by the Clerk. One time payroll cost to covert in the amount of $256,000.00. Annual loss of interest earnings of $50,000.	
Exempt Employees. Exempt employees draw 1/26th of their annual salary each pay period	Neutral	Neutral	Additional processing cost?	
Implementation Date. Commence 1/1/2002	Dovetails nicely into the personnel reform currently being examined by the elected officials and move to the new courthouse.	Continuing potential exposure to FLSA liability until implemented.		

Appendix 41

OPTION #2
Full Compliance w/ partial 7K for Security Services
(The Perfect Practical World)

Proposal	Advantages	Disadvantages	Potential Costs to Implement	Comments
Hourly Employees. All hourly employees turn in time and are paid an hourly wage for the number of hours worked.	Solves all current FLSA compliance issues. Always pay the right amount and sick and vacation are accurate. Can be automated.	Every department and division will have to keep track of hours worked.	Payroll programming and a timekeeping system. Approximately 1 month to reprogram to add time and attendance.	We should be doing this anyway. We are not in complete technical compliance with FLSA.
Overtime. Overtime is computed after forty hours per week. Leave a 14 day 7K provision for security services.	Still reasonably simple, easy to use rule that all departments and divisions can follow.	Some more modest amount of disruption to law enforcement. More scheduling flexibility for law enforcement than Option #1, but less than Option #3.	Less than Option #1.	3 rules to learn and program.
Pay Period. 26 pay periods per year lagging time earned by 2 weeks	Helps retain lower wage entry level employees where turnover is highest	Some additional expense to process.	Same as above.	
Exempt Employees. Exempt employees draw 1/26th of their annual salary each pay period	Neutral	Neutral	Same as above.	
Implementation Date. Commence 1/1/2002	Dovetails nicely into the personnel reform currently being examined by the elected officials and move to the new courthouse.	Continuing potential exposure to FLSA liability until implemented.		

Appendix 41

OPTION #3
Full Compliance with full 7K for Security Services

Proposal	Advantages	Disadvantages	Potential Costs to Implement	Comments
Hourly Employees. All hourly employees turn in time and are paid an hourly wage for the number of hours worked.	Solves all current FLSA compliance issues. Always pay the right amount and sick and vacation are accurate. Can be automated.	Every department and division will have to keep track of hours worked.	Payroll programming and a timekeeping system. Approximately 1 month to reprogram to add time and attendance.	We should be doing this anyway. We are not in complete technical compliance with FLSA.
Overtime. Overtime is computed after forty hours per week for all but security services.	Simple, easy to use rule that all departments and divisions can follow. More flexibility in scheduling for law enforcement than with Option #2.	Disrupts law enforcement and other security cultures.	None.	
Pay Period. 26 pay periods per year for all but 7K employees, logging time earned by 2 weeks. 7K would have 13 pay periods.	Helps retain lower wage entry level employees where turnover is highest	Some additional expense to process and some additional expenses for two time systems.	Same as above.	4 rules to learn and program.
Exempt Employees. Exempt employees draw 1/26th of their annual salary each pay period			Same as above.	
Implementation Date. Commence 1/1/2002	Dovetails nicely into the personnel reform currently being examined by the elected officials and move to the new courthouse.	Continuing potential exposure to FLSA liability.		

Appendix 41

OPTION #4
Full Compliance with Monthly Pay Periods

Proposal	Advantages	Disadvantages	Potential Costs to Implement	Comments
Hourly Employees. All hourly employees turn in time and are paid an hourly wage for the number of hours worked.	Solves all current FLSA compliance issues. Can be automated. Does not solve month end time and attendance problems.	Every department and division will have to keep track of hours worked. Overtime, sick and vacation must be adjusted retroactively.	Payroll programming and a timekeeping system. Approximately 1 month to reprogram to add time and attendance.	We should be doing this anyway. We are not in complete technical compliance with FLSA.
Overtime. Eliminate the 7K exemption Countywide. Overtime is computed after forty hours per week.	Simple, easy to use rule that all departments and divisions can follow. Does require a cutoff for overtime which doesn't get picked up for a month.	Disrupts law enforcement and other security cultures.	Additional pay for detention overtime. Probably no extra for the Sheriff since he pays OT after 10 hours each day	
Pay Period. Same as current.	Helps retain lower wage entry level employees where turnover is highest	Some additional expense to process.		
Exempt Employees. Same as current Practice	Neutral	Neutral		
Implementation Date. Commence 1/1/2002	Dovetails nicely into the personnel reform currently being examined by the elected officials and move to the new courthouse.	Continuing potential exposure to FLSA liability.	Costs of litigation, back pay, and fines when FLSA is not complied with.	

Appendix 41

OPTION #5
Do Nothing Except Address Issues as They Arise

Proposal	Advantages	Disadvantages	Potential Costs to Implement	Comments
Hourly Employees. All hourly employees turn in time and are paid an hourly wage for the number of hours worked.	Solves all current FLSA compliance issues for regular employees if continual training is done. 7K pay periods are almost impossible to match with a monthly pay period.	Every department and division will have to keep track of hours worked. Paychecks will fluctuate from month to month. Overtime, sick and vacation must be adjusted retroactively.	Payroll programming and a timekeeping system. Additional cost to correct time entries retroactively.	We should be doing this anyway. We are not in complete technical compliance with FLSA.
Overtime. Same as current practice except correct problems.	No Change from current practice.	The 7K exemption is extremely difficult to learn and keep track of on a monthly pay system resulting in constant problem solving.	None, except for current problem areas and the ongoing potential for further noncompliance costs.	
Pay Period. 12 per year.	Does not require change.	Does not address turnover and aid in recruitment of entry-level employees.	None.	
Exempt Employees. Same as current practice.	Neutral	Neutral	None	
Implementation Date. As soon as practical.	Can commence ad hoc solutions promptly.	Continuing potential exposure to FLSA liability from turnover in accounting personnel and difficulty coordinating differing pay and compliance periods.	Costs of litigation, back pay, and fines when FLSA is not complied with.	

APPENDIX 42 – LETTER TO PETITIONER FROM DIRECTOR OF IDAHO DEPARTMENT OF LABOR, ROGER B. MADSEN, DATED FEBRUARY 23, 2000, STATING THE DEPARTMENT HAS NO AUTHORITY TO INVESTIGATE WAGE CLAIMS AGAINST PUBLIC AGENCIES [ADA COUNTY], AND GIBSON SHOULD SEEK RECOVERY UNDER PROVISIONS OF THE FAIR LABOR STANDARDS ACT, 29 U.S.C. § 201 *ET SEQ.*

February 23, 2000

Ms. Stacy A. Gibson
5501 Tinker St.
Boise, ID 83709

Dear Ms. Gibson:

I reviewed your letter, dated February 16, 2000, requesting that the Department investigate six separate wage claims you are alleging against Ada County, your former employer. You asked that the Department investigate you wage claims pursuant to Idaho's Claims for Wages Act, Idaho Code § 45-601 *et seq*. However, the provisions of this Act do not apply to public employers. Therefore, this Department has no authority to conduct a wage claim investigation against Ada County.

The federal Fair Labor Standards Act, 29 U.S.C. § 201 *et seq*., does apply to both public and private employers. If you believe that Ada County has violated the provisions of this federal law, then you should file your claims with the United States Department of Labor, Wage and Hour Division, 1150 N. Curtis Road, Suite 200, Boise, Idaho 83706.

Appendix 42

I am sorry the Department could not be of assistance to you.

Respectfully yours,

s/ Roger B. Madsen
Roger B. Madsen
Director

APPENDIX 43 – LETTER FROM PETITIONER'S COUNSEL TO ADA COUNTY SHERIFF DATED FEBRUARY 18, 2000, DEMANDING ADA COUNTY PAY PETITIONER ALL WAGES TO WHICH SHE IS ENTITLED, INCLUDING EARNINGS OWED FROM COUNTY'S BREACH OF EMPLOYMENT CONTRACT

February 18, 2000

Mr. Vaughn Killeen
Ada County Sheriff's Office
7200 Barrister
Boise, Idaho 83704

RE: Stacy Gibson

Dear Sheriff Killeen:

Pursuant to Idaho Code Sections 45-606, 607, 609 and 610, Ms. Gibson does herewith give notice to your Department that ALL wages due and owing her, including those periods of earnings to which she is entitled due to the County's breach of agreement, shall be processed, and forwarded to my office, no later than the close of business on Thursday, February 24, 2000.

By this letter, you are given notice that should the above requested wages not be processed and delivered, Ms. Gibson will file a formal wage claim with the Director of the Idaho Department of Labor, in accordance with Idaho Code, Section 45-617.

s/ Vernon K. Smith
Vernon K. Smith

APPENDIX 44 – LETTER FROM STEPHEN E. SPENCER, M.D. TO IDAHO STATE BOARD OF MEDICINE, DATED FEBRUARY 3, 2000, ADVISING THE SHERIFF'S LEGAL ADVISOR, R. MONTE MACCONNELL, WAS INTENTIONALLY DISTORTING INFORMATION CONCERNING GIBSON

Patient Name: GIBSON, STACY A.

Date of Birth: 08/30/1958

February 3, 2000

RE: Stacy A. Gibson

Dear Ms. Leonard:

I received a copy of a letter addressed to you from Vaughn Killeen, Ada County Sheriff via R. Monte McConnell, legal advisor to the sheriff and dated January 28, 2000. The content of this letter intentionally distorts information that I have required to present on behalf of Mrs. Gibson. Mrs. Gibson has been the target of some very serious allegations which greatly impact her future and livelihood. The actions taken against Mrs. Gibson by the county have had a devastating impact on her emotional well-being. This woman is an extremely caring, thoughtful and sensitive person. She has genuinely been severely depressed and terribly anxious and anguished over this predicament. If she had been dealt with in an understanding and supportive way from the beginning, this issue probably would have been promptly resolved. Unfortunately, those in a position of authority chose to attack and impugn her, leaving her powerless to help resolve this issue quickly. The net result was the need for legal

representation on her part. The county has been unwilling to provide information necessary for her legal defense and one has to wonder what they are hiding. Mr. and Mrs. Gibson through their attorney have repeatedly requested records of a medical evaluation performed by Dr. Charles Steuart and they have been denied this information. This letter suggests that there is no written documentation of that evaluation which is unfathomable given the seriousness of the circumstance requiring this evaluation. If a permanent record of this interaction does exist, then perhaps the Gibson's have a legal right to review that with their attorney as any patient does have with their medical record.

Yours truly,

s/ Stephen E. Spencer, M.D.
STEPHEN E. SPENCER, MD
SS: ar
D/D: 02/04/2000
T/D: 02/04/2000

APPENDIX 45 – LETTER FROM ADA COUNTY PROSECUTOR'S OFFICE TO PETITIONER'S COUNSEL DATED JANUARY 7, 2000, ADDRESSING APPEAL PROVISIONS OF ADA COUNTY MERIT SYSTEM, CLAIMING PETITIONER WAS OBLIGATED TO SIGN PAYROLL VOUCHERS WITHIN FIVE DAYS, AND DENYING PETITIONER WAGES AFTER AUGUST 24, 1999

January 7, 2000

HAND DELIVERED

Vernon K. Smith, Esq.
1900 W. Main Street
Boise, Idaho 83702

RE: Stacy A. Gibson, Notice of Appeal of Decision to Terminate Employment

Dear Mr. Smith:

Ada County is in receipt of your client's Notice of Appeal of the Ada County Sheriff's decision to terminate Ms. Gibson's employment with the Ada County Sheriff's Office. As required by Ada County Code § 1-7G-3L, the Director of Ada County Human Resources has contacted the Ada County Personnel Hearing Officer, Lance Salladay. If he has not done so already, Mr. Salladay will be contacting your office to schedule the mandatory prehearing conference to determine discovery issues and deadlines. This conference is to be held within forty-eight (48) yours of the county's receipt of a notice

of appeal, unless it is postponed by agreement of both parties and the Personnel Hearing Officer.

Ada County Code § 1-7G-3L requires that the employee appeal the decision. The appeal received by the county was signed by yourself and a Mr. John M. Gibson, indicating that Mr. Gibson holds a power of attorney for Ms. Gibson. Ada County will need verification that Mr. Gibson in fact holds such a valid power of attorney. Please forward a copy of the instrument creating Mr. Gibson's power of attorney for Ms. Gibson to this office.

Regarding Ms. Gibson's claim for wages for dates between July 5, 1999 and January, 2000, Ms. Gibson's status as of August 24, 1999, was "on administrative leave without pay," and she is therefore owed no wages or benefits from that date forward. Ada County did, however, pay her medical insurance and life insurance premiums for the month of September, 1999. If Ms. Gibson received a payroll warrant in either July or August, 1999 which she believed did not match that which she was due, she had an obligation and opportunity to bring that to her supervisor's attention at the time, and for five days following the date, she signed her payroll voucher stating that the amount was correct. In any event, a claim for wages by Ms. Gibson is not ripe at this time. Idaho Code § 45-606 states that wages shall be paid upon termination of employment. Termination of Ms. Gibson's employment will not be effective, if at all, until after the Personnel Hearing Officer renders his decision in this matter.

GREG H. BOWER
Ada County Prosecuting Attorney

Appendix 45

s/ Kelli B. Brauner

BY: Kelli B. Brauner
Deputy Prosecuting Attorney

KBB:by

cc: R. Monte MacConnell

APPENDIX 46 – LETTER FROM ADA COUNTY SHERIFF, VAUGHN KILLEEN, DATED DECEMBER 27, 1999, MISREPRESENTING FACTS AND DUE PROCESS PROVISIONS OF THE ADA COUNTY CODE (MERIT SYSTEM), AND TERMINATING PETITIONER'S CLASSIFIED EMPLOYMENT WITHOUT PROVIDING PETITIONER A *LOUDERMILL* DUE PROCESS HEARING

December 27, 1999

Vernon K. Smith, Esq.
1900 W. Main Street
Boise, Idaho 83702

Re: Stacy Gibson

Dear Mr. Smith:

Pursuant to notice given you on Friday, December 17, I met with you at 2 PM, December 20, 1999, to afford your client, Ms. Gibson the opportunity to address the contemplated disciplinary action of dismissal. Also present at that meeting were Monte MacConnell and Susan Thomas, as my counsel. You asserted that it was still Ms. Gibson's position that she could not subject herself to an informal hearing with me because of her medical condition. You then proceeded to summarize Ms. Gibson's arguments in her defense and suggested an informal meeting between me and Ms. Gibson to resolve this matter.

Upon full consideration of the facts and your proposal for an informal meeting, I do not believe than an informal meeting is

the procedure contemplated by the County Code at 1-7G3, nor do I believe such a meeting would be productive. Ms. Gibson accepted over $8,500.00 in excess salary payments. The overpayments exceeded her correct salary by over $1,000.00 per month, for a period of approximately eight months. She never called this overpayment to the attention of her supervisor or anyone else in authority.

I have considered the facts and issues you have raised on behalf of Ms. Gibson. I cannot accept as exculpatory Ms. Gibson's contention that she simply did not keep track of her bank records or read her payroll statement before signing them. Ms. Gibson has been given five opportunities since August to personally appear and speak to me about this matter. *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S. Ct. 1487 (1985), does not require that an employee appear personally before a contemplated disciplinary action is imposed, only that the employee be given that opportunity. As her counsel, you appeared at the first and last of these scheduled hearings, but she has never attended. Ms. Gibson continues to assert that she is under doctor's care and unable to attend the informal hearing provided for in the County Code. You have appeared on her behalf and eloquently represented her interests as her counsel.

I regret to inform you that I have decided to terminate Ms. Gibson, effective immediately. Ms. Gibson may appeal this decision as provided in Section 1-7G-3.L of the Ada County Code. A complete copy of the relevant Chapter of the Code is enclosed. Ms. Gibson has five days from the delivery of this letter to file her written appeal with the Ada County Personnel Director.

Appendix 46

If you have any questions, please call on me at your convenience.

Sincerely Yours,

s/ Vaughn Killeen

VAUGHN KILLEEN
Ada County Sheriff

cc: Susan Thomas

APPENDIX 47 – MEDICAL RECORDS FROM STEPHEN E. SPENCER, M.D. DATED NOVEMBER 12, 1999, VERIFYING GIBSON WAS MEDICALLY INCAPABLE OF DEFENDING HERSELF AGAINST ALLEGATIONS MADE BY THE SHERIFF

Patient Name: GIBSON, STACY A.

Date of Birth: 08/30/1958

November 12, 1999

To Whom It May Concern

Dear Sir:

Mrs. Gibson has been extremely distraught over allegations of embezzlement brought by the Ada County Sheriff's Office. Between severe anxiety attacks and extreme melancholy, she has not been able to effectively deal with even simple issues in her day-to-day life and is in no frame of mind to defend herself against these allegations at this time. I have known Mrs. Gibson for five years and I have never seen her so distraught until these allegations were brought against her. She feels totally out of control because of manipulation by certain members of the Ada County Sheriff's Office. I think it is possible that if Mrs. Gibson were able to acquire information necessary to defend herself and prove her innocence, she might feel more secure and capable of doing so. However, it appears that certain members of the Ada County Sheriff's Office have chosen to prevent her from accessing requested records for her to do so. It would be my assessment that the continued obstructionism by the Ada County Sheriff's Office will

Appendix 47

perpetuate Mrs. Gibson's insecurity, isolation, anxiety and depression, making it impossible for her to defend herself.

Yours truly,

s/ Stephen E. Spencer, MD

STEPHEN E. SPENCER, MD
SES:kc
D/D: 11/12/99
T/D: 11/12/99

APPENDIX 48 – LETTER FROM SHERIFF'S LEGAL ADVISOR, R. MONTE MACCONNELL, DATED AUGUST 25, 1999, PLACING GIBSON ON ADMINISTRATIVE LEAVE WITHOUT PAY, IN VIOLATION OF ADA COUNTY CODE § 1-7G-3B (5), AND TERMINATING PETITIONER'S MEDICAL BENEFITS

August 25, 1999

Vernon K. Smith, Esq.
1900 W. Main Street
Boise, Idaho 83702

Re: Stacy Gibson

Dear Mr. Smith:

I have received your letter of August 24, 1999. In keeping with our agreement, as of close of business on August 24, Ms. Gibson will be on Administrative Leave without pay pending her recovery enough to appear at an informal hearing with the Sheriff. The purpose of the hearing will be to permit her the opportunity to explain her position regarding the Sheriff's stated intent to terminate her from employment with this department. This meeting will be considered a continuation of the hearing on August 23, at which you presented to Sheriff Killeen Ms. Gibson's version of the events giving rise to the Notice of Intent to Terminate.

As you can appreciate, the Sheriff would like to conclude this matter as soon as possible. Please contact me to discuss dates for the meeting.

Appendix 48

You mentioned Ms. Gibson's medical benefits and life insurance in your letter. Those benefits have been paid through September. After that she will have to pay the premiums in order to maintain the policies.

As before, please feel free to contact me if you have any questions.

Sincerely Yours,

VAUGHN KILLEEN
Ada County Sheriff

s/ R. Monte MacConnell

By: R. Monte MacConnell
Legal Advisor to the Sheriff

CC: Susan Thomas

APPENDIX 49 –LETTER FROM GIBSON'S COUNSEL TO THE SHERIFF'S LEGAL ADVISOR, DATED AUGUST 24, 1999, ADDRESSING WHAT CONDITIONS GIBSON WOULD CONSENT TO ADMINISTRATIVE LEAVE WITHOUT PAY

August 24, 1999

Ada County Sheriff's Office
7200 Barrister
Boise, Idaho 83704

ATTN:R. Monte MacConnell

RE: Stacy Gibson

Dear Mr. MacConnell:

Pursuant to our discussion on August 23, 1999, at approximately 3:00 p.m., I spoke with Stacy and John Gibson and they concur that effective, August 24, 1999, Ms. Gibson will agree to be on Administrative Leave, without pay, but continue with the medical coverage and benefits associated with her Group Medical Coverage and Life Insurance, as she is currently under medical care and may require additional short-term medical disability as a result of the stress created by this employment issue. This status will then continue, pending the rescheduling of this hearing, thereby allowing her to be released by the doctor to participate in these proceedings. We anticipate she will be available in late September-early October, subject to doctor's approval. If you have further questions, please so advise, until then, I remain,

Yours very truly,

Appendix 49

/s/ Vernon K. Smith
Vernon K. Smith

VKS/ckp

cc: Stacy Gibson

APPENDIX 50 – MEDICAL RECORDS FROM STEPHEN E. SPENCER, M.D. DATED AUGUST 20, 1999, VERIFYING PETITIONER'S MEDICAL CONDITION LEFT HER UNABLE TO REPRESENT HERSELF

Patient Name: GIBSON, STACY A

Date of Birth: 08/30/1959

August 20, 1999

To Whom It May Concern:

Dear Sir:

Mrs. Gibson is a patient of mine. She has been under extreme duress for the past month related to her work. She has been extremely depressed and anxious and at times, has panic attacks. Her memory is extremely poor at times and she cannot focus. If she takes medication to reduce the anxiety, then she is too sleepy to focus or remember well. There is no way that she can adequately represent herself in the present emotional state.

Yours truly,

s/ Stephen E. Spencer MD
STEPHEN E. SPENCER, MD
SES:kc
D/D: 08/20/99
T/D: 08/20/99

APPENDIX 51 –LETTER FROM THE CANYON COUNTY CHIEF DEPUTY PROSECUTOR TO THE ADA COUNTY PROSECUTOR DATED AUGUST 20, 1999, NOTIFYING CRIMINAL CHARGES AGAINST GIBSON WERE INAPPROPRIATE

August 20, 1999

Mr. Greg Bower
Ada County Prosecutor
602 W. Idaho Street
Boise, Idaho 83702

Re: Stacy Gibson / DR#18613

Dear Greg:

After reviewing the above case, it is our determination that criminal charges would be inappropriate. There does appear to be a pretty solid civil action available.

Sincerely,

s/ John A. Christensen
JOHN A. CHRISTENSEN
Chief Criminal Deputy

JC\so

APPENDIX 52 – LETTER FROM SHERIFF'S LEGAL ADVISOR, R. MONTE MACCONNELL, DATED AUGUST 11, 1999, ACKNOWLEDGING GIBSON'S RIGHT AND DEMAND FOR A DUE PROCESS PRE-TERMINATION HEARING, ACKNOWLEDGING AWARENESS OF GIBSON'S MEDICAL CONDITION, ACKNOWLEDGING SALARY PAID TO GIBSON WAS IN ERROR, AND ADVISING GIBSON WOULD RECEIVE SALARY OWED TO HER, UP TO THE ACTUAL DATE OF TERMINATION

August 11, 1999

Vernon K. Smith, Esq.
1900 W. Main Street
Boise, Idaho 83702

Re: Stacy Gibson

Dear Mr. Smith:

As mentioned in our recent conversation, I am sending you the paycheck and claim for Ms. Gibson. Please have Ms. Gibson sign the claim form and return it to me. I have also enclosed a tape of her interview with Sgt. Johnson the Sheriff's Internal Investigator, and the documents which we believe establish our claim against Ms. Gibson. The other interview tape you requested has been sent to the Prosecutor as evidence. If you want that tape you must contact the Prosecutor's Office.

You will notice that Ms. Gibson is receiving her regular salary for the last pay period (July). All other hours to be at issue in this matter. Should Ms. Gibson be terminated from employment, she will receive the salary that is ultimately determined to be owed up to her actual date of termination.

Appendix 52

You have mentioned several times that your client would like to return the monies she was paid in error. If she would like to pursue this avenue, please advise me.

I also acknowledge receipt of your letter of August 6th, in which you indicate your demand for a hearing with the Sheriff. You also sent a letter from a Dr. Spencer in which the doctor says that Ms. Gibson cannot "participate in a hearing until further notice".

There is nothing that requires Ms. Gibson's presence at the hearing. You may represent her position as her attorney, she may submit a written statement setting forth her position, or we could hold a telephonic hearing. In any event, the Sheriff must hold this meeting in a timely manner. You have agreed to meet at 2PM on August 23d, waiving any objections to the delay. The meeting will take place in the Sheriff's Conference Room in Executive Suite at 7200 Barrister Drive. Ms. Gibson is on leave with pay until that time.

If you have any questions in this matter, please call me at your convenience.

Sincerely Yours,

VAUGHN KILLEEN
Ada County Sheriff

s/ R. Monte MacConnell
By: R. Monte MacConnell
Legal Advisor to the Sheriff

APPENDIX 53 – LETTER FROM THE ADA COUNTY PROSECUTOR DATED AUGUST 9, 1999, GRANTING AUTHORITY TO THE CANYON COUNTY CHIEF CRIMINAL DEPUTY PROSECUTOR TO FILE CHARGES AGAINST GIBSON, WITH THE INTENT TO HAVE CANYON COUNTY CHIEF DEPUTY PROSECUTOR "APPOINTED" AS SPECIAL PROSECUTOR, IN A FASHION CONTRARY TO IDAHO LAW

August 9, 1999

John Christenson
Canyon County Prosecutor
1115 Albany Street
Caldwell, ID 83605

Re: Stacy Gibson DR #18613

Dear John:

Please consider this letter your authority to file charges in this case if they are considered appropriate. Upon receipt of a letter stating you acceptance of this case and the case number, I will have you appointed as special prosecutor by the Honorable Judge Eismann. If you choose to decline, please respond in writing so that we can notify victims and officers

Thank you.

Sincerely,

/s Greg H. Bower

Appendix 53

GREG H. BOWER
Ada County Prosecutor

GHB:rp
Enclosures

APPENDIX 54 – MEDICAL RECORDS FROM STEPHEN E. SPENCER, M.D., DATED AUGUST 5, 1999, VERIFYING GIBSON'S MEDICAL CONDITION HAD NOT IMPROVED, AND SHE WAS INCAPABLE OF PARTICIPATING IN ANY HEARING UNTIL FURTHER NOTICE

Patient Name: GIBSON, STACY A

To Whom It May Concern:

RE: Stacy A. Gibson

Dear Sir:

Mrs. Gibson is a patient of mine who has been under tremendous emotional duress lately due to circumstantial difficulties. We are currently trying to stabilize her with medication but her condition has not improved to the point where she can participate in a hearing until further notice

Yours truly,

s/s Stephen E. Spencer, MD

STEPHEN E. SPENCER, MD
SES:kc
D/D: 08/05/99
T/D: 08/05/99

APPENDIX 55 – NOTICE OF INTENT TO IMPOSE DISCIPLINE [TERMINATION] ON GIBSON FROM ADA COUNTY SHERIFF DATED AUGUST 2, 1999, CONTAINING MISSTATED FACTS, FALSE CHARGES, CONTRARY TO ANY GOOD CAUSE TO TERMINATE EMPLOYMENT, AND ACKNOWLEDGING GIBSON'S RIGHT TO A DUE PROCESS PRE-TERMINATION HEARING

August 2, 1999

Deputy Stacy Gibson
5501 Tinker St.
Boise, ID 83709

RE: Notice of Intent To Impose Discipline

Dear Deputy Gibson::

Pursuant to Ada County Code, Section 1-7G-3.B, you are hereby formally notified that it is my intent to terminate you. In imposing this discipline, I find that you have violated Ada County Code, Section 1-7G-3.A (5), in that you conducted yourself in such a manner as to be detrimental to the good order and discipline of this department; and, (20), in that you knowingly made a materially misleading statement in an official report. You have also violated Section 9.04, of the Ada County Sheriff's Office Policy Manual, in that you conducted yourself in such a manner as to reflect unfavorably on this department and yourself. The specific facts giving rise to these charges are enumerated below.

Between November, 1998, and June, 1999, you signed eight Ada County Pay Claim forms which indicated your salary was $3050.00 (copies attached), knowing at the time that your monthly salary was $1550.00. This resulted in an overpayment

Appendix 55

to you in take-home pay of $8508.88. You failed to notify this office of this error in payment and have since made no effort to correct this overpayment or to repay the moneys to you in error. After reviewing the report on this matter, I am satisfied that you have violated both Ada County Personnel Code and Ada County Sheriff's Office Policies as enumerated above. Accordingly, it is my intent to terminate you from employment with the Ada County Sheriff's Office on August 7, 1999. We have been informed that Vernon K. Smith is your counsel in this matter and that all notices are to be delivered through him. As a result, a copy of this letter has also been sent to Mr. Smith.

You have a right to file a written response to this Notice of Intent to Impose Discipline within five (5) days of receipt of this letter. If you decide to file a response, you must personally deliver a copy to the Sheriff, the County Prosecuting Attorney and the County Personnel Director. This response will constitute an appeal of the action I have taken. Your failure to respond within the time provided will constitute a waiver of your right to appeal this action. A copy of Ada County Code Section 1-7G-3, has been enclosed for your information.

You are placed on Administrative Leave with pay until August 7, 1999, or until I have rendered my written decision following your reply and hearing. In the event you decide to appeal this matter further, you will be placed on administrative leave without pay pending completion of the appeal process, pursuant to Ada County Code Section 1-7G-3.F.

Sincerely Yours,

Appendix 55

/s Vaughn Killeen

VAUGHN KILLEEN
Ada County Sheriff

CC: Ada County Prosecuting Attorney
Ada County Personnel Officer

APPENDIX 56 –COMMUNICATION FROM ADA COUNTY PAYROLL DEPARTMENT DATED JULY 19, 1999, TO THE BUDGET DIRECTOR OF ADA COUNTY SHERIFF'S OFFICE

ADA COUNTY
PAYROLL DEPT.

Fax

TO:	*Kelli Bolicek*	*From:*	MERRILY WILFONG
Fax:	(208) 364-2202	Pages:	*6*
Phone:	364-2203	Date:	*7/19/99*
Re:	*OT HOURS*	CC:	

- Comments

Kelli—

Original in Mail.

Thanks,
s/ Merrily

Appendix 56

To: Kelli Bolicek
Date: July 19, 1999
From: Payroll
RE: OT Hours

Kelli,

Here is a copy of the OT sheets for the employees that were shorted pay from October 1998 through June 1999. The difference column is the amount that will be included in their *July* pay. If you have any questions please give me a call. Because we will be calling for vouchers on July 22nd, I will need the Personnel Action forms for these employees, turned in ASAP. Please let Doris know so we can get this cleared up this pay period.

Thanks for your help,

Merrily Wilfong (xt 2203)

Appendix 56

1903.50
446.50
$2350.00

WRIGHT, JUSTIN R. EMP #54476

DATE	OT EARNED	PAID	S/B PAID	DIFFERENCE
November-98	15.00-10.00	$140.76	$203.40	$62.64
April-99	6.00-4.00	$56.30 ✓	$81.36	$25.06
June-99	17.25-11.50	$161.85 ✓	$233.91	$72.06
		TOTAL OWED	[redacted]	159.76

GIBSON, STACY A. EMP #54224

DATE	OT EARNED	PAID	S/B PAID	DIFFERENCE
November-98	17.25-11.50	$151.71 ✓ 151.80	$303.60	$151.89
January-99	60.00-40.00	$527.70 527.40	$1,056.00	$528.30
April-99	54.00-36.00	$474.93 182.76	$950.40	$475.47
May-99	78.00-52.00	$686.01 687.32	$1,372.80	$686.79
June-99	18.00-12.00	$158.31 160.92	$316.80	$158.49
		1998.66 2031.62		
		✓ TOTAL OWED	[redacted]	
		$3296		

do not pay

18,600 = 36,6

BEST AVAILABLE COPY

Appendix 56

KOOPMAN, EDWARD B. EMP #54473

DATE	OT EARNED	PAID	S/B PAID	DIFFERENCE
November-98	11.50-7.67	$110.30	$159.28	$48.98
December-98	16.00-10.67	$153.41	$221.60	$68.19
January-99	3.00-2.00	$28.76	$41.55	$12.79
March-99	1.50-1.00	$14.43	$20.78	$6.35
April-99	3.00-2.00	$28.76	$41.55	$12.79
May-99	3.00-2.00	$28.76	$41.55	$12.79
			TOTAL OWED	[redacted] 161.89

WEBB, DENISE A. EMP #01417

DATE	OT EARNED	PAID	S/B PAID	DIFFERENCE
February-99	9.00-6.00	$118.29	$189.27	$70.98
March-99	9.00-6.00	$118.29	$189.27	$70.98
April-99	7.60-5.00	$98.63	$157.73	$59.10
			TOTAL OWED	[redacted] 201.06

Appendix 56

SEARCY, ANTONIO EMP #52296

DATE	OT EARNED	PAID	S/B PAID	DIFFERENCE
March-99	4.50-3.00	$58.78	$93.96	$35.18
April 99	10.50-7.00	$137.08	$219.24	$82.16

TOTAL OWED [redacted] 117.34

Appendix 56

NANCE, MIKE R. EMP #54474

DATE	OT EARNED	PAID	S/B PAID	DIFFERENCE
October-98	4.50-3.00	$62.33	$62.33	$0.00
November-98	19.50-13.00	$187.01	$270.08	$83.07
December-98	42.00-28.00	$402.69	$581.70	$179.01
January-99	65.25-43.50	$668.91	$903.71	$234.80
February-99	34.50-23.00	$330.83	$477.83	$147.00
March-99	14.25-9.50	$136.69	$197.36	$60.67
April-99	28.50-19.00	$273.30	$394.73	$121.43
June-99	3.00-2.00	$31.14	$45.00	$13.86
			TOTAL OWED	[redacted] 839.84

RASMUSSEN, SHELLIE EMP #53606

DATE	OT EARNED	PAID	S/B PAID	DIFFERENCE
November-98	12.00-8.00	$124.60	$180.00	$55.40
January-99	4.50-3.00	$45.35	$67.50	$22.15
February-99	17.13-11.42	$177.90	$256.95	$79.05
March-99	4.50-3.00	$46.77	$67.50	$20.73
April-99	30.38-20.25	$315.45	$455.70	$140.25
May-99	26.25-17.50	$272.63	$393.75	$121.22
			TOTAL OWED	[redacted] 438.80

Appendix 56

BUSTOS, JAVIER EMP #53781

DATE	OT EARNED	PAID	S/B PAID	DIFFERENCE
November-98	12.00-8.00	$124.60	$180.00	$55.40
May-99	10.50-7.00	$109.07	$157.50	$48.43
June-99	3.00-2.00	$31.14	$45.00	$13.86
			TOTAL OWED	[redacted] 117.69

KINZEL, MICHAEL A EMP #54074

DATE	OT EARNED	PAID	S/B PAID	DIFFERENCE
October-98	5.25-3.50	$75.71	$75.71	$0.00
November-98	12.00-8.00	$119.78	$173.04	$53.26
January-99	35.55-23.70	$383.44	$553.87	$170.43
February-99	2.25-1.50	$24.24	$35.06	$10.82
April-99	2.25-1.50	$24.24	$35.06	$10.82
June-99	19.75-13.17	$213.02	$307.71	$94.69
			TOTAL OWED	[redacted] 340.02

APPENDIX 57 – MEMORANDUM FROM SHERIFF'S LEGAL ADVISOR, R. MONTE MACCONNELL, DATED DECEMBER 23, 1997, CONFIRMING NON-COMMISSIONED DEPUTIES COULD NOT BE COMPENSATED UNDER FLSA § 207 k, AS THOSE DEPUTIES WERE NOT "LAW ENFORCEMENT PERSONNEL", AND EMPLOYEES COULD NOT WAIVE THEIR PROTECTIONS UNDER FLSA

MEMORANDUM

DATE: December 23, 1997

TO: Capt. Dan Douthit

FROM: Monte MacConnell
s/ RMM

SUBJECT: FLSA 7(k) Exemption

I have been asked if the office staff at BSU could voluntarily submit to be scheduled on a 4 x 12 work week under the exemption to the FLSA requirements.

Unfortunately, the answer I come up with is, "No". That exemption is only available to use with "law enforcement" personnel. The FLSA Handbook specifically provides that "Not eligible for the 207(k) exemption are civilian employees who engage in support activities, such as dispatchers, … clerks and stenographers." Para. 622. I read that provision to exclude office staff.

Further, "law enforcement" personnel are affirmatively defined to mean uniformed law enforcers with the power of

arrest and who have undergone specific law enforcement related training, ie., POST Academy. I do not think that includes the clerical staff of the ACSO.

I know that the BSU sub-office is trying to find a way out of the overtime problem, but I am afraid that there is no way to do that short of hiring another FTP. There is also case law which holds that employees may not waive their protections under the FLSA. So even if the BSU staff volunteers their time, we would have to compensate them at overtime rates.

cc: Lt. Cowles
Sgt. Rouse

Supreme Court, U.S.
FILED
06-233 AUG 11 2006
OFFICE OF THE CLERK

(3)

No. 06-

IN THE

Supreme Court of the United States

STACY A. GIBSON,

Petitioner,

v.

ADA COUNTY, *et al*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IDAHO

PETITION FOR WRIT OF CERTIORARI

APPENDIX – VOLUME II

APPENDICES A – H

Vernon K. Smith
1900 W. Main Street
Boise, Idaho 83702
(208) 345-1125
Attorney for Petitioner

TABLE OF APPENDICES – VOLUME II

Page

COUNTY ORDINANCES

APPENDIX A – Ada County Personnel System (Merit System), § 1-7-1 Through § 1-7L-10, Ada County Code (Chapter 7)..... 277a

APPENDIX B – Ada County Hearing Procedures, § 1-14-1 Through § 1-14-8, Ada County Code (Chapter 14)..... 394a

APPENDIX C – Ada County Ordinance No. 612 ..... 399a

IDAHO CONSTITUTION

APPENDIX D – Article 18, § 6..... 412a

IDAHO STATUTES

APPENDIX E – Title 31 (Counties And County Law), Chapter 7 (Board Of County Commissioners), § 31-714 (Ordinances – penalties) 413a

APPENDIX F – Title 67 (State Government And State Affairs), Chapter 23 (Miscellaneous Provisions), § 67-2345 (Executive Sessions – When Authorized)..... 414a

APPENDIX G – Title 31 (Counties And County Law), Chapter 26 (Prosecuting Attorney), § 31-2603 (Special prosecutor – Appointment)..... ..... 416a

IDAHO RULES OF CIVIL PROCEDURE

APPENDIX H – (I.R.C.P.), Rule 84 (a)..... 418a

APPENDIX A – ADA COUNTY PERSONNEL SYSTEM (MERIT SYSTEM), § 1-7-1 THROUGH § 1-7L-10, ADA COUNTY CODE (CHAPTER 7)

CHAPTER 7

COUNTY PERSONNEL SYSTEM

SECTION:

1-7-1:	Purpose And Scope
1-7-2:	Principles And Guidelines
1- 7 -3:	Administration
1-7-3-1:	Commissioners' Personnel Advisory Council
1-7-3-2:	Personnel Director
1- 7 -4:	Rules And Regulations

1-7-1: PURPOSE AND SCOPE[1]:

A. Purpose: The purpose of this chapter and its attendant rules is to establish a uniform system of personnel administration for the classified employees of Ada County. It is declared to be the policy of the county that this system is to provide a means whereby classified employees shall be selected, retained and promoted on the basis of merit and their performance of duties, thereby affecting economy and efficiency in the administration of county government.

B. Scope Of Rules And Regulations: Unless specifically excluded in chapter 11 of this title, all offices, departments and agencies of the county shall be subject

[1] Adopted pursuant to authority conferred by article XII, section 2, of the constitution of the state of Idaho and title 31, chapter 8, Idaho Code.

to these rules and regulations without limitation, including all offices and agencies under the authority of and responsible to the county assessor, county clerk-auditor-recorder, county treasurer, county prosecuting attorney, county sheriff, county coroner, county commissioners, western Idaho fair and fourth district court. Ada County agencies, departments and officers excluded from these rules and regulations include: the Ada planning association, air quality board, highway district and mosquito abatement district. The system of personnel administration created by these rules and regulations and that body of positions to which these rules and regulations apply shall be referred to as the "classified service".

C. Modifications: The county reserves the right to change any or all of these rules and regulations or any portion thereof, at any time, without any advance notice. Nothing in this chapter shall be construed otherwise. (Ord. 110-18-85, 1-21-1985; amd. Ord. 141, 8-29-1985; amd. Ord. 143, 11-20-1985; amd. Ord. 179,8-24-1987; amd. Ord. 182, 9-24-1987; amd. Ord. 204, 6-19-1989; amd. Ord. 205, 7-24-1989; amd. Ord. 219, 5-3-1990; amd. Ord. 224, 7-9-1990; amd. Ord. 246, 6-18-1992; amd. Ord. 278, 9-13-1994; amd. Ord. 288, 3-2-1995; amd. Ord. 308, 6-25-1996; amd. Ord. 328, 4-8-1997; amd. Ord. 335, 7-15-1997; amd. Ord. 343, 9-9-1997; amd. Ord. 351, 1-13-1998; amd. Ord. 371, 4-27-1999; amd. Ord. 381, 9-7-1999; amd. Ord. 388, 2-1-2000; amd. Ord. 400, 10-24-2000)

1-7-2: **PRINCIPLES AND GUIDELINES:**

Appendix A

A. All appointments and promotions in the classified service and all measures for the control and regulation of employment of such positions and separations therefrom, shall be based on merit, efficiency and fitness to serve.

B. No person shall be disqualified from taking an examination, from appointment to a position, from promotion, or from holding a position in the classified service because of race or national origin, color, sex, age, political or religious opinion or affiliation of nonjob-related handicap, nor shall any person be separated, demoted or transferred from any position in classified service or otherwise discriminated against in compensation, terms, conditions or privileges of employment for any of these reasons.

C. Each county-elected official and appointed department head, as assigned authority by the responsible elected official, shall retain the right, in accordance with applicable laws and these rules to:

1. Direct employees of the county;

2. Hire, promote, transfer, assign, determine work schedules, and retain employees in positions within the county, and to suspend, demote, discharge or take other disciplinary action against employees for cause;

3. Relieve employees from duties because of lack of work;

4. Maintain the efficiency of the government operations entrusted to them;

5. Determine the methods, means and personnel by which such operations are to be conducted;

6. Take the necessary actions to carry out the mission of their agency.

D. Repealed.

E. Employees shall be provided opportunities for training as required to assure high quality performance and career development when such training is considered advantageous to the county as determined by elected officials or department heads.

F, Employees shall have the right to fair consideration of their grievances and appeals, and shall be free from discrimination or reprisal because of an exercise of their rights through grievance procedures. Employees may be represented by a person of their own choosing.

G. Employees shall be treated equitably with reference to hours of employment, holidays, approved leaves and other terms and conditions of employment. (Ord. 110, 12-10-1980; amd. Ord. 149, 4-2-1986; amd. Ord. 182, 9-24-1987)

1 -7-3: **ADMINISTRATION:**

1- 7 -3-1: **COMMISSIONERS' PERSONNEL ADVISORY COUNCIL**: (Ord. 110, 12-10-1980; rep. by Ord. 141, 8-29-1985)

1-7-3-2: **PERSONNEL DIRECTOR:** The personnel director shall be responsible for assisting the board and

other elected officials in the administration of the personnel system and in the conduct of technical personnel activities. Other duties and responsibilities, subject to the review and approval of the board, shall include, but are not limited to, the following:

A. For those departments which are directly responsible to the board, the personnel director shall have such additional authority, duties or responsibilities as may be assigned or delegated by the board;

B. The collection, maintenance and dissemination of job applications to the different county offices and departments;

C. Monitoring the operation and effect of this chapter, the rules and regulations made hereunder; making reports of irregularities to the board and other elected officials, and developing such proposed personnel rules, regulations and procedures as may be desired by the elected officials;

D. Developing and maintaining a position and classification system, compensation plan, grievance policy and procedure and such other special programs as may be required for approval by the elected officials;

E. Reviewing state and federal laws, promulgations for their effect on county personnel operations and suggesting appropriate courses of action to bring the county personnel system into compliance;

F. Establishing and maintaining personnel records and data for reference, litigation, equal employment

opportunity reporting, employment verification, and for such other purposes as may be necessary;

G. Providing all employees with access to an up-to-date copy of all personnel rules, regulations and policies which may be adopted pursuant to this chapter;

H. Conducting new employee orientations and providing information on county benefits to county employees; and

I. Conducting salary surveys or participating in salary surveys of private industry and other governmental units as it deems necessary, but not less than every fiscal year. (Ord. 110, 12-10-1980; amd. Ord. 149, 4-2-1980; amd. Ord. 179, 8-24-1987; amd. Ord. 278, 9-13-1994)

1- 7 –4: **RULES AND REGULATIONS**[2]: (Ord. 110, 12-10-1980; rep. By Ord. 141, 8-29-1985)

CHAPTER 7

COUNTY PERSONNEL SYSTEM

ARTICLE A. DISCRIMINATION

SECTION:

1-7A-1: Equal Employment Opportunity And Affirmative Action Policy

[2] See articles A through M of this chapter.

Appendix A

1-7A-2: Harassment And Discrimination Policy

1-7A-3: Americans With Disabilities

1-7A-1: **EQUAL EMPLOYMENT OPPORTUNITY AND AFFIRMATIVE ACTION POLICY:**

A. It is the policy of Ada County to comply with the guidance set forth in title VII of the civil rights act of 1964, and appropriate consideration will be given to applicable federal and state regulations.

B. Ada County will hire, promote, classify, transfer, discipline and discharge all persons without reference to race, color, religion, sex, age, national origin or disability. No class of jobs will be closed to any individual because of the above referenced criteria.

C. Personnel will be compensated on the basis of equal pay for equal work. No individual will receive reduced or augmented compensation for work on the basis of race, color, religion, sex, age, national origin or disability. (Ord. 110, 12-10-1980; amd. Ord. 278, 9-13-1994; amd. Ord. 364, 9-1-1998; amd. Ord. 370, 3-16-1999)

1-7A-2: **HARASSMENT AND DISCRIMINATION POLICY:**

A. Policy: Ada County is committed to providing a work environment where its employees and those served by the county are treated respectfully and are free from harassment. Ada County prohibits employee harassment. Harassment is considered misconduct.

Appendix A

Employees are responsible for respecting the rights of coworkers and others to be free from harassment. Further, all managers and supervisors are responsible for ensuring an atmosphere free of harassment, sexual and otherwise. Anyone found to be engaging in harassing behavior will be subject to prompt, corrective and/or disciplinary action proportionate to the offense.

Employees of Ada County who feel they have been harassed should report the offensive behavior through one or more of the complaint procedures outlined in this policy. Retaliation against an employee or a former employee who reports harassment or participates in an investigation is strictly prohibited.

Managers and supervisors of Ada County are required to take prompt, appropriate action upon observing or becoming aware of harassing behavior. The failure of managers or supervisors to respond promptly to an observed or reported instance of harassment may result in disciplinary action against the manager or supervisor.

B. General Harassment:

1. General harassment is a violation of this policy. It is conduct that is insulting, degrading and shows hostility toward an individual, such that a reasonable employee would find it offensive, and it occurs with sufficient frequency such that it:

a. Has the purpose or effect of creating an intimidating, hostile or offensive environment; or

b. Has the purpose or effect of unreasonably interfering with an individual's work performance.

2. Prohibited general harassment includes the following types of behavior:

a. Written, graphic, or other communication which contains degrading comments, jokes, or negative stereotyping;

b. Intimidating or threatening conduct that is directed at an employee.

3. General harassment does not include. the following management actions: duty assignments, disciplinary actions and performance evaluations.

C. Procedures For Reporting General Harassment: If an employee feels he or she is the target of general harassment, they are encouraged to report the behavior. If comfortable doing so, the employee may address the issue with the harassing party directly, either in person or in writing. If uncomfortable with confronting the harassing party directly, or, if after doing so the behavior has not stopped, the employee is encouraged to report the behavior to any manager, supervisor, the department head or elected official within the employee's department. Reports of general harassment will be investigated by the department head or elected official or his or her designee, pursuant to departmental policies and procedures, and disciplinary measures will be taken if appropriate.

Appendix A

D. Unlawful Discrimination:

1. Harassment which is based on an employee's age, gender, color, national origin, religion or disability is a form of unlawful discrimination. Such behavior is a violation of this policy and may also be a violation of State and Federal laws prohibiting employment discrimination.

2. Sexual harassment is unlawful discrimination based on gender and is defined as unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature when:

a. Submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment; or

b. Submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual; or

c. Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

E. Procedures For Reporting Unlawful Discrimination:

1. If an employee feels he or she has been the target of unlawful discrimination, the employee's remedies are as follows:

a. If comfortable doing so, the employee may address the issue with the offending party directly, either in person or in writing.

b. If uncomfortable with confronting the offending party, or, if after doing so the behavior has not stopped, the employee must report the behavior to any manager, supervisor, the department head or elected official within the employee's department or to the Director of Human Resources.

c. Employees of departments that conduct formal internal investigations of misconduct must report unlawful discrimination as prescribed by the regulations and procedures set forth by such department.

d. An employee who is uncomfortable with the reporting mechanisms outlined in this subsection is still strongly encouraged to discuss the matter with the Director of Human Resources and allow the County the opportunity to intervene in an appropriate manner. The County cannot assist an employee who does not report the discriminatory conduct.

F, Investigations Of Unlawful Discrimination:

1. When unlawful discrimination or a report of such conduct comes to the attention of an elected official, department head, supervisor or manager, that individual must act promptly to ensure that the situation is assessed, thoroughly investigated, and that appropriate

resolution measures are implemented.

2. Departments that conduct formal internal investigations of misconduct shall investigate claims of unlawful discrimination as prescribed by the regulations and procedures set forth by such department.

3. All other departments are responsible for contacting the Director of Human Resources as soon as practical, but not later than five (5) business days after unlawful discrimination has been observed or reported. The Director of Human Resources or his or her designee, after consultation with the Prosecuting Attorney's office, civil division, within five (5) business days of receiving a report of unlawful discrimination, shall provide a recommendation of follow-up assessment or inquiry and/or formal investigation, as warranted, to the responsible elected official. To the extent further investigation is conducted, confidentiality will be maintained on a need to know basis. Management is responsible for assisting and cooperating in any investigation that is conducted. All investigations, except those conducted in departments with formal internal investigative procedures, shall be conducted by or at the direction of the Director of Human Resources, who shall, at the conclusion of an investigation, cause a written investigative report to be prepared, detailing the charges and the conclusions of the investigator.

4. If an employee is the target of unlawful discrimination by a noncounty employee, the conduct should be reported as provided in subsection E of this Section. Ada County will promptly contact that

individual's employer and seek to establish guidelines for conducting an appropriate investigation. To the extent Ada County is not authorized to take disciplinary action against an individual found to be unlawfully harassing an employee, Ada County is nonetheless committed to protecting its employees, and will, with the employee's consent, take whatever measures are reasonably necessary to ensure that the employee is able to work in a harassment-free environment.

5. Elected officials of Ada County who are found in violation of this policy will be subject to sanctions, as permitted by State law.

6. An employee who fabricates a charge of harassment or retaliation, or who fails to provide truthful information during an investigation, is subject to disciplinary action, up to and including termination.

G. Follow-Up Procedures After Investigation Of Unlawful Discrimination:

1. Departments that conduct formal internal investigations of unlawful discrimination shall utilize the follow-up procedures prescribed by that department's policies and procedures.

2. Following an investigation of unlawful discrimination conducted by or at the direction of the Director of Human Resources, the Director or his or her designee shall meet as soon as practical, separately with the complainant and the alleged harasser to discuss the findings of the investigative report. The Director or his or her designee shall also discuss the findings and

appropriate disciplinary measures with the supervisor(s) responsible for an employee found in violation of this policy. Discipline, up to and including termination, may be initiated against any employee who violates this policy. In order to provide and maintain a workplace free of harassment, Ada County may pursue a disciplinary action against an employee found in violation of this policy with or without the authorization of the complainant. To ensure that retaliatory actions are not taken against any employee who reports or is found to have been the target of unlawful discrimination, the Director or his or her designee shall contact the complainant not less than once every sixty (60) days for at least one year following the complaint, at which time the employee should relay any continuing problems or acts of retaliation.

3. At the conclusion of an investigation, the Director of Human Resources shall retain the original investigative report and shall provide a copy of the report to the Prosecuting Attorney's office, civil division, who shall maintain a separate and confidential file for records of unlawful discrimination investigations, along with any records of preventive or corrective action taken by any supervising elected official. Any employee disciplined for violating this harassment policy shall have a copy of the notice of disciplinary action placed in his or her permanent personnel file.

H. Retaliation:

1. Retaliation for reporting unlawful discrimination or for participating in an investigation is strictly

prohibited. Retaliatory actions may include, but are not limited to, unsubstantiated negative evaluations, inappropriate changes in job assignments or duties, or negative treatment by coworkers. Retaliation does not include disciplinary actions that are taken against an employee who files a fabricated claim of harassment, nor does it include disciplinary actions taken against an employee for performance issues not related to the harassment complaint.

2. Employees should report acts of retaliation arising out of general harassment as provided in subsection C of this Section. The department head, elected official, or his or her designee must investigate the report and take appropriate corrective action.

3. Employees should report acts of retaliation arising out of unlawful discrimination or an investigation of such conduct as provided in subsection E of this Section. Such reports must be investigated thoroughly. Supervisors, managers or elected officials who suspect acts of retaliation or receive reports of retaliation shall report such incidents to the Director of Human Resources in the same manner as reports of unlawful discrimination. The Director shall cause any such report to be investigated as provided in subsection F3 of this Section. Appropriate follow-up measures shall be employed as necessary. Disciplinary action, up to and including termination, may be taken against anyone who violates this retaliation policy.

I. Responsibilities For Preventing Harassment And Retaliation:

Appendix A

1. Managers and supervisors have the primary responsibility for creating and sustaining a harassment-free environment through proper supervision, training, and clear communications.

2. All county employees are responsible for assisting managers and supervisors in creating and sustaining a harassment-free environment by respecting the rights of others to be free from harassment and acts of retaliation.

3. Persons who have been harassed are responsible for taking advantage of the options available to them for preventing or correcting harassing behavior and preventing or correcting acts of retaliation. (Ord. 180, 9-10-1987; amd. Ord. 364, 9-1-1998; amd. Ord. 370, 3-16-1999)

1-7A-3: **AMERICANS WITH DISABILITIES:**

A. It is the policy of Ada County to comply with the Americans with disabilities act, and appropriate consideration will be given to applicable federal and state regulations.

B. Ada County shall not discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement or discharge of employees, employee compensation, job training and other terms, conditions and privileges of employment.

C. Ada County will provide "reasonable accommodations", as defined in the Americans with

disabilities act, to the known physical or mental limitations of the applicant or employee who is a qualified individual with a disability unless such accommodation would impose an undue hardship on the county.

D. Ada County will not retaliate against an applicant or employee who is a qualified individual with a disability because the applicant or employee asserted his or her rights under the Americans with disabilities act. (Ord. 278, 9-13-1994; amd. Ord. 370, 3-16-1999; amd. Ord. 383, 10-12-1999)

CHAPTER 7

COUNTY PERSONNEL SYSTEM

ARTICLE B. DEFINITIONS[1]

SECTION:

1-7B-1: Definitions

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[1] Prior ordinance history: Ord. 110, 12-10-1980; Ord. 110-2-83, 9-14-1983; Ord. 110-17-85, 1-15-1985; Ord. 110-18-85,1-21-1985; Ord. 141,8-29-1985; Ord. 146, 1-22-1986; Ord. 157, 11-12-1986; Ord. 162, 12-17-1986; Ord. 163, 12-17-1986; Ord. 173, 6-22-1987, eff. retroactive to 1-1-1987; Ord. 179,8-24-1987; Ord. 180,9-10-1987; Ord. 182,9-24-1987; Ord. 186, 3-3-1988; Ord. 219, 5-3-1990; Ord. 224, 7-9-1990; Ord. 239, 5-16-1991; Ord. 248, 6-22-1992; Ord. 273, 3-24-1994; Ord. 278, 9-13-1994; Ord. 340, 9-2-1997; Ord. 369, 2-23-1999.

Appendix A

1-7B-1: **DEFINITIONS:** Each of the terms defined in this rule shall have the meaning given herein unless a different meaning is clearly required by the context.

ALLOCATION: The assignment of a class to a pay band in the compensation schedule.

APPOINTMENT, EMERGENCY: Appointment of a person, as an at will employee, to a position for a period of time not to exceed fifteen (15) calendar days when an emergency exists in which there is immediate peril to life or property.

APPOINTMENT, PERMANENT: The appointment to a permanent, classified position of a person who has successfully completed the required probationary period and whose employment is permanent, subject to removal or discipline only under application of the provisions of these rules and regulations.

APPOINTMENT, PROBATIONARY: The appointment of a person to a permanent, classified position for which the person has qualified, but is serving a work trial period

	prior to certification to a permanent appointment.
APPOINTMENT, TEMPORARY:	Appointment of a person, as an at will employee, to a position in which employment will not exceed eight (8) months during any twelve (12) month period. Employees working under contracts, such as those provided for by the job training partnership act, shall not be considered permanent employees where their employment exceeds eight (8) months in duration.
BOARD:	The board of county commissioners.
BREAK IN SERVICE:	That period of time immediately following termination of employment with the county which extends to any subsequent employment with the county. A break in service includes, but is not limited to, terminations and resignations.
CLASS:	A group of positions sufficiently similar as to the duties performed, degree of supervision exercised or required, minimum requirements of training,

	experience or skill, and other characteristics so that the same title, and same tests of fitness and the same schedule of compensation may be applied to each position of this group.
CLASSIFICATION AND COMPENSATION SCHEDULE:	A listing of all classes utilized by the county listed by title, class code, and pay band to which allocated by the board.
CLASSIFIED SERVICE:	The system of personnel administration created by this chapter, and that body of positions, as outlined in subsection 1-7-1 B of this chapter, to which these rules and regulations apply.
COMMISSIONED OFFICER:	Any member of the Ada County sheriff's office who has sworn under oath to support and defend the constitution of the United States and the constitution and laws of the state of Idaho, has the peace officer's power of arrest, and is required to be certified as a peace officer by the Idaho peace officers standards and training council.

Appendix A

COMPENSABLE TIME:	All the time during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed workplace, including all work which occurs with the knowledge or permission of the employer, with the exception of time spent in an organized program of related supplemental instruction by employees working under a bona fide apprenticeship program approved by the bureau of apprenticeship and training, U.S. department of labor.
COMPENSATORY TIME OFF:	Approved paid time off from duty provided as compensation for overtime worked, or approved paid time off from duty provided in exchange for accumulated sick leave.
COUNTY:	Ada County and the elected officials of each department, agency or office of Ada County.
DEMOTION:	The reduction of an employee from a position which the employee occupies in one class to a position in another class with a lower entrance salary.

Appendix A

DEPARTMENT:	A subdivision or branch of administration within the county government which may be comprised of one or more divisions.
DEPARTMENT HEAD:	Any nonelected official in charge of any department, agency or office of Ada County government.
DISABLED VETERAN:	A person who had active service in any war or conflict officially engaged in by the government of the United States and who is officially recognized by the United States veterans' administration as having a disability incurred in service.
DISCIPLINARY REVIEW:	A formal period of special review for the purposes of evaluating and correcting any or all aspects of an employee's behavior, conduct, activities, performance of duties, appearance, attitude, maintenance of qualifications and certifications, ~~, etc~~., which may involve close supervision, frequent and close observation, documentation, and evaluation for compliance with standards or

requirements for his or her department or office.

DISMISSAL: The termination of employment of an employee at the determination of the elected official or department head when no resignation or application for retirement is submitted by the employee.

EMS FIELD PERSONNEL: Those employees of the emergency medical services department whose primary responsibility is to provide out-of-hospital emergency medical care and transportation.

ELECTED OFFICIAL: The board of county commissioners, prosecuting attorney, treasurer, assessor, clerk-auditor-recorder, sheriff and coroner of Ada County. And, for the purposes of this personnel ordinance and all administrative functions addressed herein, such as, but not limited to, hearing disciplinary appeals and nondisciplinary grievances, the administrative judge for the fourth judicial district court who has supervisory control over the juvenile court services

department and the fourth district court or his or her designee.

EMERGENCY SERVICES PERSONNEL: Employees in the sheriff's department who are commissioned officers with peace officers' power of arrest and who are required to be certified as peace officers by the Idaho peace officers standards and training council, or are assigned as security officers within the sheriff's security services division; and field personnel in the emergency medical services department.

EMPLOYEE: Any person in the employ of a department of Ada County who is paid a salary or wage, excluding officials or officers elected by popular vote.

EMPLOYEE, ADMINISTRATIVE: Any person appointed to a position and who meets the following criteria:

A. Performs responsible office or nonmanual work directly related to the management policies of a department or section; and

B. Customarily and regularly exercises discretion and independent judgment, as distinguished from using skills and following procedures. The employee must have authority to make important decisions; and

C. Regularly assists a bona fide executive or administrative employee; or works, under general supervision, along specialized or technical lines requiring special training, experience or knowledge; and

D. Is paid more than the amount of pay set forth in the fair labor standards act.

EMPLOYEE, AT WILL: Those employees of Ada County, as specified in subsection 1-11 A-1 B of this title, who serve at the will and pleasure of their supervising elected official, and whose employment may be terminated at any time, with or without cause, and who are not subject to the rules and regulations of the classified service as outlined in this chapter, but who are subject to the rules and regulations of at

will personnel as outlined in chapter 11 of this title.

EMPLOYEE, CLASSIFIED: Those employees, as specified in subsection 1- 7 -1 B of this chapter, who are subject to the rules and regulations of the classified service, as outlined in this chapter.

EMPLOYEE, EXECUTIVE: Any person appointed to a position equivalent to a department head or above, and who meets the following criteria:

A. An individual whose primary duty is management of a department or section; and

B. Who customarily and regularly directs the work of two (2) or more other employees; and

C. Who has the authority to hire and fire other employees or whose suggestions and recommendations as to the hiring or firing and as to the advancement or promotion or any other change of status of other employees will be given particular weight; and

D. Who customarily and regularly exercises discretionary powers; and

E. Who is paid more than the amount of pay set forth in the fair labor standards act.

EMPLOYEE, KEY: A salaried family and medical leave act-eligible county employee who is among the highest ten percent (10%) of all salaried and nonsalaried, eligible and ineligible county employees.

EMPLOYEE, PART-TIME: Any employee whose usual scheduled work is less than forty (40) hours in a period of one hundred sixty eight (168) consecutive hours.

EMPLOYEE, PROFESSIONAL: Any person appointed to a position and who meets the following criteria:

A. An individual whose primary duties consist of the performance of work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual

instruction and study, as distinguished from a general academic education and from an apprenticeship, and from training in the performance of routine mental, manual or physical processes; and

B. Whose work requires the consistent exercise of discretion and judgment in its performance; and

C. Whose work is predominantly intellectual and varied in character (as opposed to routine mental, manual, mechanical or physical work) and is of such character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; and

D. Who is paid more than the amount of pay set forth in the fair labor standards act. Provided, that this subsection concerning pay band shall not apply in the case of an employee who is the holder of a valid license or certificate permitting the practice of law or medicine or any of their branches.

Appendix A

EMPLOYEE, PROJECT AT WILL:	An employee hired for the purpose and for the duration of a particular project and/or contract. Project at will employees are at will employees and remain employees of Ada County only until the project has been completed and/or the contract has been terminated. Employment eligibility for project at will employees may be restricted by law, grant or contract requirements to specific individuals or groups on the basis of nonmerit selection requirements.
EMPLOYEE, TEMPORARY:	Any at will employee holding a position for which the appointment shall not last longer than eight (8) months in any twelve (12) month period, excluding employees appointed under special grants such as those provided for in the job training partnership act.
EXAMINATION:	The application of written tests, oral interviews, performance tests, investigations, psychological tests, physical

evaluation, or any other measure of job-related ability.

FIVE LEVEL RATING SYSTEM: A performance evaluation rating system which uses five (5) levels for rating employees' job-related performance, such as outstanding, very good, good, marginal, unsatisfactory, or the equivalent.

INBAND INCREASE: Movement of an employee's rate of pay from a lower to a higher rate of pay within the same pay band.

INBAND REDUCTION IN PAY: A reduction of an employee's rate of pay within the pay band to which the employee's class is allocated.

INCUMBENT: Any person holding a position in the county service regardless of status.

INDIVIDUAL WITH DISABILITY: Any person who has a physical or mental impairment which substantially limits one or more of such person's major life activities, has a record of such

impairment, or is regarded as having such an impairment.

INTERMITTENT LEAVE: Leave relating to family and medical leave which is taken in separate blocks of time rather than in one continuous period of time, including leaves of an hour or more to several weeks for such purposes as medical appointments and therapy.

LAYOFF: An involuntary separation of an incumbent in the classified service either by reason of a reduction of force due to lack of work or funds or by reason of abolishment of the position, excluding separations due to termination of temporary or project at will appointments.

LEAVE OF ABSENCE WITH PAY: A period of absence from duty, granted by the elected official or department head responsible for the department or office, with the concurrence of the board of county commissioners, during which the employee will be eompensated.

Appendix A

LEAVE OF ABSENCE WITHOUT PAY:	A period of absence from duty with the approval of the appointing authority during which time the employee will not be compensated.
MONTH OF SERVICE:	Any calendar month in which an employee was employed and received compensation for at least fifteen (15) calendar days, including regular days off, vacation, sick leave and holidays.
OFFICIAL DUTIES:	Those things required to be done by law or by direction of the employee's supervisor, those matters directly involving the county or the county's interests, or those situations where the validity of the county's procedures are directly in issue.
OVERTIME, CASUAL:	Overtime of an irregular nature, not expected to continue for more than a day or two (2). Casual overtime occurs at infrequent intervals and is of such a nature that it cannot be accurately predicted for any given period of time.

Appendix A

OVERTIME, REGULARLY SCHEDULED:	Overtime that occurs at regular intervals and which can be accurately predicted for a given period of time.
OVERTIME WORKED:	Compensable time worked in excess of forty (40) hours in a workweek consisting of one hundred sixty eight (168) consecutive hours, unless the employee is a participant in an apprenticeship training program approved by the United States department of labor, bureau of apprenticeship and training, in which case, the apprenticeship agreement shall control. Exception: The elected officials in charge of fire protection and law enforcement may choose to adopt the "7K" exemption to the federal fair labor standards act - as that provision may be amended from time to time - for determining overtime compensation.
PAY BAND:	The pay range allocated to a job class by the board from a compensation schedule stating the minimum and maximum rate

of pay allowed an employee performing a job in that particular class.

PERFORMANCE EVALUATION: The systematic evaluation of an employee with respect to performance on the job and potential for development.

PERMANENT POSITION: A position in which the employment of one person is required for more than eight (8) months in any twelve (12) month period. Contract employees and employees hired under special grants such as those provided for by the job training partnership act shall not be considered permanent employees.

POSITION: A group of duties and responsibilities legally assigned or delegated by one or more appointing authorities and requiring the employment of at least one person.

PROMOTION: The advancement of an employee from a position which he or she occupies in one class to a position in another class having a higher entrance salary.

Appendix A

QUALIFIED INDIVIDUAL WITH A DISABILITY:	An individual with disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such person holds or desires.
REALLOCATION:	A change of a class from the pay band to which it is allocated in the compensation schedule to another pay band of either higher or lower entrance salary.
RECLASSIFICATION:	A change of a position from the class to which it is assigned to another class due to changes in the duties and responsibilities of the affected position. A reclassification may or may not include an increase or decrease in pay.
REDUCED LEAVE SCHEDULE:	Work schedule, relating to family and medical leave, which reduces the usual number of work hours per workday or workweek for such purposes as recovering from a serious health condition from which an employee is not strong nor healthy enough to work full time.

REINSTATEMENT:	The reappointment to classified service, per section 1-7D-7 of this chapter, of a former classified employee who had attained permanent status.
RESIGNATION:	The termination of employment of an employee made at the request of the employee excluding retirement.
RETIREMENT:	The termination of an employee, voluntarily or otherwise, under provisions of the public employee retirement system.
SERIOUS HEALTH CONDITION:	An illness, injury, impairment or physical or mental condition that involves: a) any period of incapacity or treatment in connection with or consequent to inpatient care in a hospital, hospice or residential medical care facility; b) any period of incapacity requiring absence from work, school or other regular daily activities, of more than three (3) calendar days, that also involves continuing treatment by, or under the supervision of, a health care provider; or c) continuing treatment by, or under the

supervision of, a health care provider for a chronic or long-term health condition that is incurable or so serious that, if not treated, would likely result in a period of incapacity of more than three (3) calendar days; or for prenatal care.

SEXUAL HARASSMENT: Unwelcome sexual advances, requests for sexual favors, other verbal comments and/or physical conduct of a sexual nature when:

A. Submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment;

B. Submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual; or

C. Such conduct has the purpose or effect of creating an intimidating, hostile, or offensive working environment.

SICK LEAVE: A period of exemption from work granted to employees during which time said

	employees shall be compensated when caused by personal illness, injury, or other causes as outlined in sections 1-71-3 and 1-71-4 of this chapter.
SUSPENSION:	An enforced period of absence, with or without pay, for disciplinary purposes or pending investigation of charges made against an employee.
THREE LEVEL RATING SYSTEM:	A performance evaluation rating system which uses three (3) levels for rating employees' job-related performance, such as "Exceeds Standards", "Meets Standards", "Does Not Meet Standards", or the equivalent.
TRANSFER:	A change of an employee from one position to another class in the same pay band for which the employee qualifies, or a change of work location or organizational unit.
VACATION LEAVE:	A period of exemption from work granted to employees during which time said employees shall be compensated. The terms shall not include

compensatory time for overtime work.

YEAR: A fiscal year from the date of October 1 through September 30 of the following calendar year. (Ord. 383, 10-12-1999; amd. Ord. 400, 10-24-2000; amd. Ord. 401, 10-31-2000)

CHAPTER 7

COUNTY PERSONNEL SYSTEM

ARTICLE C. COMPENSATION AND CLASSIFICATION[1]

SECTION:

1-7C- 1: Compensation
1-7C- 2: Compensation Plan Review
1-7C- 3: Operation Of Compensation Plan
1-7C- 4: Reclassification
1-7C- 5: Promotions
1-7C- 6: Reduction Of Salary
1-7C- 7: Overtime Compensation
1-7C- 8: Temporary And Part-Time Employees
1-7C- 9: Exemption
1-7C-10: Workers' Compensation Supplemental Pay And Benefits

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[1] Prior ordinance history: Ord. 110, 12-10-1980; Ord., 4-25-1984; 1984 Code; Ord. 110-18-85,1-21-1985; Ord. 141,8-29-1985; Ord. 146, 1-22-1986; Ord. 149,4-2-1986; Ord. 179,8-24-1987; Ord. 182,9-24-1987; Ord. 219, 5-3-1990; Ord. 231, 2-7-1991; Ord. 278, 9-13-1994; Ord. 292, 5-24-1995; Ord. 340, 9-2-1997.

Appendix A

1-7C-1: **COMPENSATION:** Notwithstanding any other Ada County code provisions, department policy provisions, handbook provisions, letters, oral representations, or any other representations to the contrary, all compensation provided to all Ada County employees shall be in compliance with applicable provisions of the fair labor standards act (FLSA)[2]. (Ord. 383, 10-12-1999)

1-7C-2: **COMPENSATION PLAN REVIEW:** (Rep. by Ord. 179, 8-24-1987)

1-7C-3: **OPERATION OF COMPENSATION PLAN:**

A. Rate Of Pay Determination: Classified county employees shall be paid neither less than the minimum nor more than the maximum of the pay band for the class as established in any county compensation schedule approved by the board. However, an employee's rate of pay may exceed the maximum of the pay band for his or her class in exceptional situations, as deemed appropriate by the board. An employee's rate of pay may be less than the minimum of the pay band for his or her class, when the minimum salary for the pay band has been increased during the employee's incumbency, and: 1) the employee's job performance does not warrant a salary or merit increase, 2) the employee is on disciplinary review, or 3) the employee is on leave without pay. Conversely, an employee's rate

[2] 29 USC § 207 and 29 CFR.

of pay may exceed the maximum of the salary range for his or her class when an employee's position is reclassified to a class allocated to a different pay band, or when an employee's class is reallocated to a different pay band, after which time the individual shall be permitted to continue at his or her present rate of pay during the period of incumbency (except in the event of general service-wide reductions), but shall not be entitled to a pay increase.

B. Wage And Salary Rates: All monthly rates of pay authorized are for full-time employment. Payment for part-time service shall be paid at the scheduled hourly rate.

C. Pay Periods: The county will not make pay advances to its employees. Salaried employees and part-time employees working the same number of hours every month will receive their paychecks the last working day of each month, with the exception of any emergency situation as determined by the elected official and as accepted by the board of county commissioners. Pay periods for part-time employees working a varying number of hours every month will be from the twenty first through the twentieth of the following month, and they will receive their paychecks the last working day of each month.

D. Entrance Rates Of Pay: The entrance rate of pay for new appointees in any class shall be the minimum rate of pay of the pay band of that class except as provided herein. When necessary to recruit, upon oral or written request by the appropriate elected official or department head to the board, and when supported by

acceptable reasons, a higher rate of pay may be authorized provided that:

1. Requests for appointments at a higher rate of pay are approved by the board prior to the actual appointment of the affected employee; and

2. The appointee's qualifications materially exceed those of other applicants.

E. Advancements: New employees may receive an inband increase or merit increase after successfully completing their entrance probationary period or at any time prior to that date provided the advancement is recommended by his or her supervising elected official and is approved by the board. Each employee may be eligible for a merit increase on an annual basis upon certification of satisfactory performance by his or her immediate supervisor on a notice of personnel action form approved by the board. (Ord. 383, 10-12-1999)

1-7C-4: **RECLASSIFICATION:**

A. Should the duties and responsibilities of a position change significantly, the elected official and/or department head shall submit a request for reclassification with a position description. The request will be reviewed and recommendation made and forwarded to the board of county commissioners for final approval.

B. If a circumstance should arise requiring the abolition of a certain position(s), job security may be maintained by

one of the following, at the discretion of the elected official responsible for said position(s):

1. The employee may be returned to a previous position;

2. The employee may be promoted based on merit, qualifications and a position being available;

3. The employee may be transferred to another department to fill a position of equal pay;

4. The employee may be reclassified to a lower position in which he or she holds status.

If none of the above alternatives are available, the employee may be dismissed or laid off. (Ord. 383,10-12-1999)

1-7C-5: **PROMOTIONS:**

A. An employee receiving a promotion shall be paid at a rate of pay in the pay band of the class into which they are promoted. The maximum pay adjustment for promotions shall be limited to the percentage difference between the entrance level of pay of the employee's pay band before promotion and the entrance level of pay of the employee's pay band after promotion. Each department and office shall ensure that all employees affected by promotions are treated uniformly in terms of pay increases.

B. At the discretion of the department head or elected official, employees may be required to fill a position in

a class with a higher pay band on a temporary or short-term basis. Such temporary or short-term assignment does not necessarily constitute authority for additional pay increases until the position is held more than forty five (45) consecutive calendar days. Should the employee hold the position beyond forty five (45) consecutive calendar days, he or she shall receive the minimum rate of pay of the pay band to which the employee is assigned on a temporary or short-term basis, or receive a five percent (5%) increase, whichever is greater. The salary increase shall be retroactive to the day of assignment, and shall continue until the position is filled with an employee on permanent assignment. (Ord. 383, 10-12-1999; amd. Ord. 411, 10-3-2000)

1-7C-6: **REDUCTION OF SALARY:**

A. The rate of pay of an employee receiving more than the minimum rate of pay of the pay band for his or her class may be reduced to a rate of pay of not less than the minimum for the pay band by the elected official responsible for said position, for disciplinary reasons enumerated in article G of this chapter.

B. The rate of pay of an employee may be reduced by the responsible elected official, with the consent of the board, for administrative reasons such as:

Overpayments made due to administrative or other errors;

Voluntary or involuntary reductions in work hours;

Appendix A

Voluntary and nondisciplinary-involuntary demotions;

Shortage of funds or appropriations;

Reallocations of classes;

Ineligibility for shift differential pay; and/or

For other good and sufficient reasons as determined by the responsible elected official with the consent of the board. (Ord. 383, 10-12-1999)

1-7C-7: **OVERTIME COMPENSATION:**

A. Ada County embraces the general policy that overtime will be kept to a minimum within a department.

B. Classified employees who fall within the definition of an executive, administrative or professional employee shall be ineligible for cash compensation for overtime worked, unless such compensation is authorized by the board of county commissioners and supervising elected official for overtime accumulated during usual or emergency situations. Such classified employees may be authorized to take compensatory time off for overtime worked with the consent of their supervising elected official and/or department head. Compensatory time off, if authorized, shall be allowed on an hour-for-hour basis, shall not be transferable and shall be forfeited at the time of transfer to another department or upon separation from county service.

C. Classified employees who do not meet the definition of an "executive", "administrative" or "professional

employee" shall be paid cash compensation for overtime worked at the rate of one and one-half (1 ½) times the hourly rate of that employee. Compensatory time off may be authorized in lieu of cash compensation at the discretion of the elected official and/or department head, upon reaching an agreement therefor, in advance, with the employee. Compensatory time off, when authorized, shall be earned and allowed on a one and one-half (1 ½) for one hour basis.

D. Cash compensation for overtime hours worked, when paid, shall be paid at one and one-half (1 ½) times the hourly rate of that employee's salary or wage, except for those employees whose positions fall within the definitions of executive, administrative or professional.

E. All overtime to be compensated in cash payment will be paid within the pay period earned and accrued, unless it is earned after the fifteenth of a calendar month, at which time the cash compensation will be paid the following month.

F. Compensatory time off accrued by classified employees, if authorized, need not be used within the pay period in which it is earned and accrued. However, such compensatory time off shall not be allowed to accrue beyond a total of forty (40) hours, with the exception of the sheriff's office, the court clerk's division of the clerk-auditor-recorder's office, the juvenile court services department and the emergency medical services department, whose compensatory time off shall not be allowed to accrue beyond a total of sixty (60) hours. Any overtime accrued above this maximum shall be paid in cash. Provided, however,

those classified employees who do not fall within the definitions of "professional", "administrative" or "executive" and who have compensatory time off which is unused at the date of transfer to another department in county service, or the date of separation from county employment, shall receive cash compensation for accrued compensatory time off at the rate of one and one-half (1 ½) to one for overtime hours worked.

G. It will be the responsibility of the elected official or delegated department head to maintain an overtime roster and to record the amount of regular time and authorized overtime worked by each individual employee. Overtime sheets will be turned into the payroll office not later than the fifteenth of each month. Hours to be paid at the overtime rate of one and one-half (1 ½) to one will be totaled and clearly marked. Overtime hours which have been taken as compensatory time off will be totaled and clearly marked. (Ord. 383, 10-12-1999)

1-7C-8: **TEMPORARY AND PART-TIME EMPLOYEES:**

A. Repealed.

B. Permanent Part-Time Employees: Individuals may be hired on a part-time basis, which means the employee works less than forty (40) hours in a period of one hundred sixty eight (168) consecutive hours.

Employees working in excess of twenty (20) hours per week, and for more than five (5) consecutive months,

will be required to pay contributions to the Idaho public employees retirement system in accordance with title 59, chapter 13, Idaho Code.

C. Hourly Rate; Exceptions: The hourly rate paid shall be at the minimum rate for the classification to which the employee is assigned. The only exceptions are for persons with outstanding qualifications, experience or length of service of two (2) years or more with the county. (Ord. 383, 10-12-1999)

1-7C-9: **EXEMPTION:** (Rep. by Ord. 141,8-29-1985)

1-7C-10: **WORKERS' COMPENSATION SUPPLEMENTAL PAY AND BENEFITS:**

A. Emergency services personnel who are on duty and performing their official county duties which relate to accomplishing or supervising the accomplishment of their respective departments' primary mission, and who are injured on the job, as provided in subsection C of this section, shall be placed on leave of absence with pay and shall be paid the difference between the employee's regular gross monthly salary, including regularly earned overtime for emergency medical services field personnel, at the date of injury, and the employee's workers' compensation insurance benefits for that pay period.

B. Other county employees who are on duty and who are injured on the job, as provided in subsection C of this section, shall be placed on leave of absence with pay and shall be paid the difference between the employee's regular gross monthly salary, at the date of injury, and

the employee's workers' compensation insurance benefits for that pay period.

C. Injuries for which workers' compensation supplemental pay and benefits shall be given include those which are sustained when emergency services personnel and other county employees, while in the course and scope of their employment duties:

1. Place themselves in significant danger or at a significant risk of danger; or

2. Perform heroic acts to protect or save human life and/or personal property.

D. Employees may make application for workers' compensation supplemental pay and benefits by submitting to their supervisors a copy of their workers' compensation benefit voucher. The workers' compensation supplemental pay and benefits shall not affect settlement between such employees and the Idaho industrial commission regarding other disability benefits.

E. Upon application, the board shall determine if an employee's injury meets the required standards, and shall make the final determination of eligibility for workers' compensation supplemental pay and benefits. A denial of benefits may be appealed through the grievance procedure provided in section 1-7H-1 of this chapter.

F. In accordance with section 1-7K-3 of this chapter, employees for whom workers' compensation

supplemental pay has been approved shall be given fringe benefits including county-paid medical, dental, vision, life and disability insurance, retirement, vacation and sick leave accrual, and salary increases.

G. Workers' compensation supplemental pay and benefits shall terminate when the first of any of the following occurs:

1. The employee is released to return to duty as approved by the Idaho industrial commission;

2. The time period ends, as set by the Idaho industrial commission, for receipt of workers' compensation benefits, including partial or total disability; or

3. The employment relationship between the county and the employee receiving such supplemental pay and benefits is terminated by either party. (Ord. 383,10-12-1999)

CHAPTER 7

COUNTY PERSONNEL SYSTEM

ARTICLE D. APPOINTMENTS[1]

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[1] Prior ordinance history: Ord. 110, 12-10-1980; Ord. 110-2-83, 9-14-1983; Ord., 5-9-1984; Ord. 157,11-12-1986; Ord. 179,8-24-1987; Ord. 182,9-24-1987; Ord. 204, 6-19-1989; Ord., 5-3-1990; Ord. 219, 5-3-1990; Ord. 278,9-13-1994.

Appendix A

SECTION:

1-7D-1: General
1-7D-2: Announcement Of Vacancies
1-7D-3: Examinations
1-7D-4: Applications Kept
1-7D-5: Selection Procedures
1-7D-6: Veterans Preference
1-7D-7: Reinstatement

1-7D-1: **GENERAL:**

A. All positions in the county departments shall be filled on the basis of merit and fitness without regard to race, color, religion, origin, sex, age, political affiliation or disability.

B. The county personnel department shall be notified of any position vacancy or new position in any department.

C. Whenever practical, vacancies may be filled by qualified applicants within the county, in the department where the vacancy occurs, without announcing the vacancies as provided for in section 1-7D-2 of this article.

D. Vacancies may be filled at the discretion of the appropriate elected official, department head, or appointing authority by qualified applicants from other county departments without having conducted recruitment activities either within the department in which the vacancies exist or with the general public and without announcing the vacancies as provided for in

section 1-7D-2 of this article provided, however, the county personnel department shall distribute an announcement of such vacancy to all county departments which shall be posted in conspicuous places.

Elected officials, department heads, and appointing authorities are not obligated to promote or transfer a qualified applicant into a vacant position in their department after having conducted either or both intradepartmental and/or interdepartmental recruitment activity. The elected official, department head, and appointing authority may conduct, at their discretion, other recruitment activities in an attempt to fill the vacant position. (Ord. 383,10-12-1999)

1- 7D-2: **ANNOUNCEMENT OF VACANCIES:** Upon notification of a vacancy, the personnel department shall distribute an announcement of such vacancy to all county departments which shall be posted in conspicuous places. Additionally, the announcement shall be distributed to locations throughout the county and other recruitment activity conducted by the personnel department. Such announcements need not be distributed, if an announcement of a vacant position in the same class and in the same office or department was: a) distributed and applications were taken within the previous thirty (30) days or b) distributed with an "indefinite" closing date and applications were taken within the previous ninety (90) days. For the purposes of this article only, employees of the fourth judicial district court and employees serving as deputy clerks for the clerk of the court are in the same office or department. The announcement shall include, but not be limited to:

A. Position classification title;

B Salary range and/or proposed salary;

C. Description of the position and listing of typical duties;

D Minimum qualifications; and

E. Department where the vacancy occurs. (Ord. 383, 10-12-1999)

1-7D-3: **EXAMINATIONS:**

A. Recruiting efforts will be planned and carried out in a manner that assures open competition. Certification procedures will be recommended through the personnel department to assist all elected officials to review and give equitable consideration to an appropriate number of eligibles based on whatever ranking system is used on the list when making a selection for appointment to county service. Ranking will be job related and will maximize validity, reliability and objectivity.

B. Competition for appropriate positions may be limited to facilitate employment of those with a substantial physical or mental impairment, the economically disadvantaged or participants in employment or rehabilitation programs authorized by congress or related programs authorized by the state.

C. In those occasional instances where there is evidence that open or limited competition is not practical, noncompetitive appointments may be made.

D. Job-related minimum requirements for entrance to a class will be established wherever they are practical. Such minimum requirements should be met by all successful candidates examined, appointed or promoted; provided, however, the county reserves the right, at the discretion of the appropriate appointing authority, to waive any of the minimum qualifications for those candidates whose general or specific qualifications would otherwise qualify the applicant for the position or lead the appointing authority to believe the applicant is capable of performing the assigned duties and fulfilling the assigned responsibilities.

E. Where it is necessary to measure the important skills, knowledge and abilities needed for entry to a job, more than one selection procedure should be used. In those cases, the human resources department may assist the elected official and/or department head in developing content-related examinations. Such examinations may be administered to all qualified applicants in order to determine their relative qualifications.

F. The selection procedure will be based on relative ability, knowledge, and skills of eligible applicants; on fair treatment without regard to an applicant's race, color, religion, sex, national origin, political affiliation, age, handicap, or other nonmerit factors except where provided for by federal law; on the equitable consideration of all eligible applicants. (Ord. 383, 10-12-1999)

1-7D-4: **APPLICATIONS KEPT:** The human resources department shall keep a list of qualified applicants in the various classified positions which

frequently experience vacancies. (Ord. 383, 10-12-1999)

1-7D-5: **SELECTION PROCEDURES:**

A. No employee shall be placed on the payroll or allowed to report for work unless the elected official and/or department head has hired the employee in conformance with these rules.

B. No classified employee shall be appointed to a class within a department without a position for such class being approved by the board. An employee control number shall be assigned to the employee by the county payroll section. (Ord. 383, 10-12-1999)

1-7D-6: **VETERANS PREFERENCE:**

A. When filling a position to which this chapter applies, the elected official or department head shall, in accordance with Idaho Code section 65-502, give preference to war veterans, as defined in Idaho Code section 65-509, who served on active duty in the armed forces of the United States for a period of more than one hundred eighty (180) days, or whose discharge or release from active duty was for a disability incurred or aggravated in the line of duty, and who were discharged under honorable conditions. Applicants must be residents of the state of Idaho when the application for work or employment is made in order to claim such preference. This preference applies to initial appointment only.

B. Disabled war veterans, as defined in Idaho Code section 65-507, shall be given preference in employment, provided that such disability does not prevent satisfactory performance of the duties of the position. (Ord. 383,10-12-1999)

1-70-7: **REINSTATEMENT:**

A. Permanent, including part-time, employees who have resigned while in good standing, or been demoted for nondisciplinary reasons, may at the discretion of the supervising elected official be eligible for reinstatement to a vacant position in the same, substantially similar, or lesser classification for which they held permanent status at the time of resignation or demotion. Employees must meet, at the time of reinstatement, the current qualifications for the class.

B. The eligibility period for reinstatement shall not exceed one year from the date of resignation or demotion.

C. Employees who have been reinstated shall be paid at the current pay band for the class; however, the specific rate of pay and number of work hours shall be determined by the elected official or department head.

D. Reinstated employees shall be permanent employees and shall be eligible for all benefits which accrue to permanent employees with the same number of work hours, and shall not be subject to any waiting periods for benefits, with the exception of waiting periods for preexisting and/or chronic conditions as outlined in fringe benefits booklets, as they may be amended from time to time. Reinstated employees shall have the same

accrual rates for vacation leave as they had at the time of resignation. Reinstated employees shall be credited with the same number of hours' sick leave as they had at the time of resignation, with a maximum credit allowance of forty eight (48) hours.

E. Reinstatement shall be allowed only if it will not interfere with such rehiring as may be required by article F of this chapter, "Layoff". (Ord. 383,10-12-1999)

CHAPTER 7

COUNTY PERSONNEL SYSTEM

ARTICLE E. PROBATIONARY PERIOD[1]

SECTION:

1-7E-1: General
1-7E-2: Certification To Permanent Appointment
1-7E-3: Unsatisfactory Service

1-7E-1: GENERAL:

A. The probationary period for the probationary appointment of an employee to a position in the classified service is normally six (6) months with the

[1] Prior ordinance history: Ord. 110-12-84, 8-22-1984; Ord. 146, 1-22-1986; Ord. 179, 8-24-1987; Ord. 204, 6-19-1989; Ord. 219, 5-3-1990; Ord. 278, 9-13-1994.

exception of EMS field personnel in the emergency medical services department and all classified employees in the office of the Ada County sheriff, in which cases, the customary probationary period is normally twelve (12) months. The probationary period shall be continuous and shall serve as a working test to evaluate the work performance and suitability of employees newly appointed or promoted.

Prior to the completion of any probationary period, the elected official in charge of the department may, at his or her discretion, extend the probationary period for an additional time period, not to exceed six (6) months, to provide the employee an additional opportunity to demonstrate an acceptable level of work performance and suitability for the job assignment. The elected official shall notify the probationary employee of the extension of the probationary period, in writing, prior to the expiration of the probationary period. A brief statement explaining the reasons for extension of the probation shall be included in the written notice. A copy of this written notice shall be sent to the Ada County personnel director, and a copy shall be retained in the employee's department personnel file.

B. There shall be three (3) types of probationary periods for employees and positions governed by the classified service:

1. Entrance Probation: Probationary service by an employee upon initial appointment to a position in the classified service or upon transfer to a different position:

a. Of the same class, in another department or office; or

b. Of a different class with the same or a lower entrance salary or pay band, in the same or another department or office.

2. Intradepartmental Promotional Probation: Probational service by an employee in the classified service upon promotion within the Ada County department or agency in which they are then working.

3. Interdepartmental Promotional Probation: Probational service by employees in the classified service upon promotion from one Ada County department or agency to another Ada County department or agency. (Ord. 383,10-12-1999)

1-7E-2: **CERTIFICATION TO PERMANENT APPOINTMENT:**

A. Upon written certification by the responsible elected official or department head to the personnel department of completion of the appropriate probationary period, the employee shall be granted permanent appointment.

B. Such permanent appointment shall be effective from the first day of the calendar month following the completion of the probationary period. (Ord. 383,10-12-1999)

1-7E-3: **UNSATISFACTORY SERVICE:**

Appendix A

A. An employee on entrance probation may be disciplined or dismissed at any time during the probationary period for any reason deemed sufficient by the elected official. Employees on entrance probation are not entitled to the grievance and appeal rights given permanent classified employees by this chapter. The elected official and/or the department head may effect a dismissal, by submission of written notice of personnel action to the employee, the county personnel department, and the county clerk's office. The employee shall be offered the option of resigning.

B. An employee on interdepartmental promotional probation shall, for all purposes of this chapter be treated no differently than an employee on entrance probation except as otherwise specifically stated.

C. An employee on intradepartmental promotional probation, who fails to render satisfactory service, shall be returned to his or her former position and pay rate, or the equivalent thereof. The time spent in the higher class shall not count towards the next inband increase of the employee. (Ord. 383,10-12-1999)

CHAPTER 7

COUNTY PERSONNEL SYSTEM

ARTICLE F. LAYOFF[1]

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[1] Prior ordinance history: Ord. 110, 12-10-1980; Ord., 5-9-1984; Ord. 157, 11-12-1986; Ord. 182,9-24-1987; Ord. 219, 5-3-1990; Ord. 239, 5-16-1991.

Appendix A

SECTION:

1-7F-1: General
1-7F-2: Order Of Layoff And Retention Points
1-7F-3: Notification And Grievance
1-7F-4: Departmental And Divisional Layoff Registers
1-7F-5: Effective Date

1-7F-1: **GENERAL:**

A. An elected official may layoff an employee in the classified service whenever the elected official deems it necessary because of:

1. A direct or indirect shortage of or reduction in funds or work;

2. Reorganization;

3. The abolishment of one or more positions;

4. Efforts to economize and/or increase efficiency;

5. Nepotism prohibitions; or

6. Any other good and sufficient reason(s) as determined by the responsible elected official with the consent of the board.

B. A demotion or downward reclassification, voluntary or involuntary, disciplinary or nondisciplinary, shall not constitute a layoff.

C. Elected officials, with the consent of the board, may exempt from layoff certain employees due to their specialized training, qualifications or assignments. (Ord. 383, 10-12-1999)

1- 7F-2: **ORDER OF LAYOFF AND RETENTION POINTS:**

A. Layoffs shall be by the class of position, shall not depend on the class of the incumbent, and may be limited to a department or division.

B. If the department or division in which a layoff is to occur has a vacant, permanent position of the same class as that affected by the layoff, the employee in the position identified to be vacated or abolished shall be transferred into the vacant position.

C. The order of layoff within the affected class shall be by type of appointment in the following order: temporary; emergency; entry probation; interdepartmental promotional probation; intradepartmental promotional probation; and permanent. An employee on an acting appointment shall be returned to his or her permanent position and class prior to the initiation of layoff procedures within the department or division. Employees on leave, whether with or without pay, will be included in the layoff.

D. The order of layoff within the type of appointment shall be by retention points. Layoffs shall commence with the employee having the fewest retention points. If the employee in the position identified to be vacated or abolished has more retention points than other

employees within the type of appointment and affected class, that employee will be transferred to the position held by the employee with the fewest retention points. If employees have the same number of retention points, identification of employees to be laid off shall be by random selection. Retention points shall be calculated using the following method:

1. Two (2) retention points shall be awarded for each month of continuous county service, regardless of department or division, except as excluded below. Eligible war veterans as defined in title 65, chapter 5, Idaho Code, as it may be amended from time to time, shall be awarded, for purposes of computing retention points only, the equivalent of two (?) years' additional creditable county service.

2. If official, written performance evaluations, signed by the responsible department or division head, or supervisor were given to evaluate an employee's performance during the employee's continuous service, except for periods as excluded below, additional retention points shall be added to or subtracted from the retention point total according to the following formulas:

FIVE LEVEL RATING SYSTEM

Retention Points Per Month To Be Added To Or Subtracted For Each Month Evaluated	Overall Evaluation Rating
+1	Outstanding or equivalent

Appendix A

+ 1	Very good or equivalent
0	Good or equivalent
-1	Marginal or equivalent
-1	Unsatisfactory or equivalent

THREE LEVEL RATING SYSTEM

Retention Points Per Month To Be Added To Or Subtracted For Each Month Evaluated	Overall Evaluation Rating
+1	Exceeds standards or equivalent
0	Meets standards or equivalent
-1	Does not meet standards or equivalent

3. No retention points shall be awarded for the following excluded periods:

a. The last three (3) months prior to layoff;

b. Periods during which an employee was on leave of absence without pay and/or suspension without pay;

c. Periods of county service ending with a break in service; and

d. County service as a temporary employee. (Ord. 383, 10-12-1999)

1-7F-3: **NOTIFICATION AND GRIEVANCE:**

A. Employees to be laid off shall be notified in writing of the layoff, the reasons therefor, and the effective date thereof.

B. Layoffs shall be grievable in accordance with article H of this chapter. Employees shall not be entitled to any pay beyond that due on the effective date of the layoff. If the grievance process continues beyond the effective date for the layoff, no interim pay shall be paid to the employee; providing, however, if the grievance is upheld, payment shall be made for all of the wages or salary lost. (Ord. 383, 10-12-1999)

1-7F-4: **DEPARTMENTAL AND DIVISIONAL LAYOFF REGISTERS:**

A. The names of classified employees laid off shall be placed on a layoff register by department or division, by class, by type of appointment, and by retention points, respectively. Employees serving in temporary or emergency appointments shall have no reemployment rights under this article, nor shall they be placed on the layoff register for their department or division.

B. Employees on the layoff register for the department or division shall be offered reemployment to a position in the class from which laid off in the department or

division from which laid off before the position may be filled by any other person.

C. Employees on a layoff register shall be offered reemployment according to the greatest number of retention points within the type of appointment. The order of reemployment by type of appointment shall be: permanent, intradepartmental promotional probation; interdepartmental promotional probation; and entry probation. If two (2) or more employees have the same number of retention points within a particular type of appointment, rehiring order shall be determined by random selection.

D. Reemployment rights under this article shall exist for six (6) months from the date of layoff or until the former employee declines two (2) different offers of reemployment, whichever occurs sooner.

E. Former employees offered reemployment under this article must report for work within seven (7) calendar days after notification of the reemployment offer.

F. Employees reemployed under this article shall be appointed with the same status they held at the time of layoff.

G. Rate of pay, benefits, number of work hours, and type of appointment for employees reemployed under this article shall be as follows:

1. Pay band shall be the current pay band for the class; however, the specific rate of pay shall be determined by the respective elected official or department head;

2. Employees reemployed under this article shall receive all fringe benefits which may be provided to permanent employees with the same number of work hours, subject to all waiting period requirements as outlined in fringe benefits booklets as they may be amended from time to time. Employees reemployed under this article shall have the same accrual rates for vacation leave as they had at the time of layoff and shall be credited with the same number of hours of sick leave as they had at the time of layoff, with a maximum credit allowance of forty eight (48) hours; and

3. The number of work hours for employees being reemployed under this article shall be determined by the respective elected official or department head. (Ord. 383, 10-12-1999)

1-7F-5: **EFFECTIVE DATE:** This article shall take effect October 1 1986. (Ord. 383, 10-12-1999)

CHAPTER 7

COUNTY PERSONNEL SYSTEM

ARTICLE G. DISCIPLINE[1]

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[1] Prior ordinance history: Ord. 110, 12-10-1980; Ord. 110-2-83,9-14-1983; Ord. 110-18-85, 1-21-1985; Ord. 141, 8-29-1985; Ord. 163, 12-17-1986; Ord. 179, 8-24-1987; Ord. 180, 9-10-1987; Ord. 204, 6-19-1989; Ord. 219, 5-3-1990; Ord. 224, 7-9-1990; Ord. 273, 3-24-1994; Ord. 278, 9-13-1994; Ord. 288, 3-2-1995.

Appendix A

SECTION:

1- 7G-1: Policy

1-7G-2: Disciplinary Procedures For Other Than Dismissals, Suspensions, Demotions Or Inband Reductions In Pay

1-7G-3: Dismissals, Suspensions, Demotions And Inband Reductions In Pay

1-7G-1: **POLICY:**

A. Employees in the classified service shall be subject to disciplinary action commensurate with the severity of the offense or accumulation of offenses.

B. Whenever possible, sufficient time for improvement should precede disciplinary action pursuant to this article.

C. Only permanent employees in the classified system shall be entitled to any grievance and/or appeal rights granted by this article. (Ord. 383,10-12-1999)

1- 7G-2: **DISCIPLINARY PROCEDURES FOR OTHER THAN DISMISSALS, SUSPENSIONS, DEMOTIONS OR INBAND REDUCTIONS IN PAY:**

A. Oral Warning: When grounds for disciplinary action exist, and the supervisor or elected official determines that more severe action is not immediately necessary, the supervisor or elected official may orally

communicate to the employee the deficiency or grounds for discipline. Documentation of the warning may be placed in the departmental personnel file kept by the elected official responsible for said employee.

B. Written Reprimand: An elected official or executive employee delegated the responsibility for personnel. actions may reprimand an employee for cause, as denominated in subsection 1-7G-3A of this article. Such reprimand shall be in writing and shall contain a short statement of the misconduct, inadequacies or other grounds for discipline. The executive employee or elected official shall discuss the problem(s) with the employee, at which time the employee shall acknowledge that he or she has been informed of the executive employee or elected official's reprimand by his or her signature on said reprimand. A copy signed by the executive employee or elected official shall be given to the employee and a copy shall be delivered to the Ada County personnel officer.

C. Disciplinary Review: An elected official may place an employee on disciplinary review for a period of time not to exceed six (6) months.

1. An employee shall be notified in writing of his or her placement on disciplinary review, the reasons therefor, and the beginning and ending dates for the review. A copy of the notice shall be sent to the Ada County personnel officer, and a copy retained in the employee's departmental or divisional personnel file.

2. The disciplinary review period shall automatically end on the date listed in the written notification to the employee, unless terminated sooner in writing.

3. While on disciplinary review, an employee shall continue to earn and accrue sick leave and vacation leave, and may use both sick leave and vacation leave. An employee shall not be eligible for merit raises while on disciplinary review.

D. Other: When grounds for disciplinary action exist, and the supervisor or elected official determines that the above disciplinary actions are inappropriate, the supervisor or elected official may administer other nonproperty right disciplinary actions other than those listed above.

E. Grievance And Appeal Procedures: A permanent employee who is dissatisfied with a disciplinary action, other than discipline in the form of dismissal, suspension, demotion and/or inband reduction in pay, shall utilize the grievance and appeal procedures contained in article H of this chapter. (Ord. 383, 1Q-12-1999)

1-7G-3: **DISMISSALS, SUSPENSIONS, DEMOTIONS AND INBAND REDUCTIONS IN PAY:** Provisions of section 1-7G-2 of this article are not a prerequisite to action under this section.

A. Employees in classified service with probationary status may be dismissed, suspended, demoted and/or administered an inband reduction in pay in accordance

with article E of this chapter. Any employee in classified service with permanent status may be dismissed, suspended, demoted and/or administered an inband reduction in pay for good cause, which shall include, but not be limited to, anyone or a combination of the following acts or omissions which occur during the period of the employee's employment with Ada County:

1. Failure to perform the duties and carry out the obligations imposed by the federal or state constitutions; federal or state statutes, rules or regulations; county ordinances; or rules and policies and procedures of his or her department or office.

2. Inefficiency, incompetency or negligence in the performance of his or her duties which interferes with the proper operation of his or her department or office, or failure to meet work standards for his or her job.

3. Failure to perform the essential functions of his or her employment position for any reason after the county has made reasonable accommodations as required by law.

4. Refusal to accept a reasonable and proper assignment from an authorized supervisor, or failure to perform assigned tasks within required time limits.

5. Insubordination or conduct detrimental to good order and discipline in the department or office, or conduct unbecoming of a county employee.

Appendix A

6. Being under the influence of any form of drug, alcohol or controlled substance, without a prescription or as authorized by law, while on duty.

7. Careless, negligent or improper use of, or unlawful conversion of, county property, equipment or funds.

8. Conviction of misconduct in office, or conviction of a felony.

9. Acceptance of gifts in exchange for influence or favors given in an official capacity.

10. Abuse or improper use of sick leave privileges.

11. Failure to report for duty at the assigned time and place.

12. Unauthorized disclosure of information from official, nonpublic records or nonpublic information otherwise obtained in the course and scope of the employee's job.

13. Absence without proper authorization of leave.

14. Misstatement or deception in application for employment.

15. Failure to obtain or maintain a current license or certificate lawfully required as a condition of performance of duties.

16. Political activity which is disruptive of the employee's mission and duties or that of his or her department or office.

17. Use of any influence which violates the principle of this merit system in an attempt to secure a promotion or other privileges for individual advantage or gain.

18. Violations of the standards of conduct as set forth in article L of this chapter.

19. Violation of Ada County's harassment and discrimination policy or retaliation against another employee for filing a report of harassment or discrimination.

20. Knowingly making a material misstatement or a materially misleading statement in an official report.

21. Making or repeating a material misstatement or materially misleading statement about a county employee or official with knowledge that the statement is untrue or misleading or making or repeating a material misstatement or materially misleading statement about a county employee or official with reckless disregard as to whether the statement is untrue or misleading.

22. Violating the family and medical leave act with respect to interference, discrimination and retaliation as outlined in article K of this chapter.

23. Violation of federal or state copyright laws regulating, but not limited to, the unauthorized copying

or distribution ("pirating") of personal computer (PC) software or data, and/or violation of any personal computer (PC) software licensing agreement.

24. Impeding, interfering with, or failing to cooperate in an official, internal or external administrative investigation conducted by or at the request of the county.

B. Whenever an elected official or an executive employee delegated the responsibility for personnel actions determines it necessary to dismiss, suspend, demote and/or administer an inband reduction in pay to a permanent employee in the classified system for one or more of the reasons set forth in subsection A of this section, or other reason deemed sufficient by the elected official, he or she shall provide written notification of the contemplated action to the employee, the county personnel director and the county prosecuting attorney. Such written notification of contemplated action shall include:

1. A detailed statement setting forth the charges, allegations of wrongdoing or alleged inadequacies of the employee.

2. A description of the employer's evidence.

3. A detailed statement of the disciplinary action to be taken (dismissal, suspension, demotion and/or inband reduction in pay) and the effective date thereof.

4. Notice to the employee that, except in cases of demotion, suspension for under thirty (30) days in

duration, and/or inband reduction in pay. he or she shall be placed on administrative leave with pay effective upon receipt of the written notification of contemplated action.

5. That, if applicable, such administrative leave with pay status shall continue until the effective date given for the contemplated action, or if the employee exercises his or her right to appeal, upon receipt of the written decision of the supervising elected official provided for in this section.

6. A copy of this article.

C. The dismissal, suspension, demotion and/or inband reduction in pay shall be effective no sooner than five (5) busrness days after receipt of the written notification of contemplated action by the affected employee. A permanent employee in the classified system may appeal the action to the elected official who has supervisory control over the department or office which employs that individual. The employee shall have five (5) business days after receipt of written notice of contemplated action to personally deliver a written response to the charges to the elected official or executive employee who has signed the notice, the county personnel director and the county prosecuting attorney. This response shall constitute an appeal of the action taken against the employee. Failure of the employee to respond within the specified time period shall constitute a waiver of any right to challenge the action.

D. Upon receipt of the written response from the employee requesting an appeal of the dismissal, suspension, demotion and/or inband reduction in pay, the elected official who has supervisory control over the department shall conduct, within five (5) business days of receipt of the written response, an informal hearing for the purpose of allowing the employee to respond to the allegations made. The elected official may conduct the hearing according to such procedures as he or she may establish in writing as long as any such procedures are not inconsistent with this chapter. The employee may be represented by an attorney, if he or she so desires. The executive employee or elected official who signed the written notification of contemplated disciplinary action shall attend and may also be represented by an attorney. The hearing may be continued, at the discretion of the elected official, to allow the elected official to investigate or review the matter as a result of testimony or other evidence presented to the elected official at the hearing. If additional grounds for discipline are discovered the employee shall receive additional notice pursuant to subsection B of this section and an additional chance to respond.

E. The elected official shall issue a written decision no later than five (5) business days after the informal hearing has been concluded. An original of the decision shall be provided to the employee, and copies shall be delivered to the county personnel director and to the county prosecuting attorney. The written decision shall include a copy of this article.

Appendix A

F. When the contemplated disciplinary action is a dismissal or a suspension for thirty (30) days or more and the employee chooses to appeal the disciplinary action to his or her supervising elected official, he or she shall be placed on administrative leave with pay until receipt of the written decision of the supervising elected official. If the employee appeals the decision of the supervising elected official to the Ada County personnel hearing officer, he or she shall be placed on administrative leave without pay, pending further completion of the appeal process set forth therein.

When the contemplated disciplinary action is a suspension with pay and the employee chooses to appeal the suspension to his or her supervising elected official, the employee shall continue to receive his or her pay during the further completion of the appeal process.

When the contemplated disciplinary action is a demotion, suspension for under thirty (30) days in duration, and/or an inband reduction in pay and the employee chooses to appeal the disciplinary action to his or her supervising elected official, the employee shall not be placed on administrative leave, however, the demotion, suspension and/or reduction in pay shall be held in abeyance until receipt of the written decision of the supervising elected official, at which time the disciplinary action shall take effect, if applicable.

G. There is hereby created the position of Ada County personnel hearing officer. The individual chosen for this position will serve when needed, as cases arise under the appeal process described herein. The person

selected as the Ada County personnel hearing officer shall be licensed to practice law in the state of Idaho, and shall have had experience in either the conduct of administrative hearings or the practice of local government law.

H. The Ada County personnel hearing officer shall be selected for a two (2) year appointment. At the conclusion of the two (2) year appointment, the hearing officer shall be reappointed or a replacement chosen by a majority vote of the selection committee.

I. The selection committee shall consist of all of the elected officials of Ada County, with the exception of the trial court administrator for the fourth judicial district court. Each elected official, excluding the trial court administrator for the fourth judicial district court, shall be entitled to vote in the selection process. The chairman of the board of Ada County commissioners shall act as chairman of the selection committee. He shall convene the first meeting of the selection committee within thirty (30) days from the date of adoption of this subsection. Additional meetings shall be conducted as the selection committee deems appropriate, but the selection process shall be completed and the Ada County personnel hearing officer shall be appointed within ninety (90) days of the initial meeting.

J. Each member of the selection committee shall have the right to nominate at least one individual who possesses the minimum qualifications set forth in subsection G of this section. The selection committee shall choose the

Ada County personnel hearing officer by majority vote of all members of the committee.

K. The Ada County personnel hearing officer shall preside over hearings to consider appeals of the employment actions brought under the provisions of this chapter. The hearing officer shall receive compensation for such duties, as determined by the selection committee.

L. If the employee is dissatisfied with the written decision of the elected official-rendered pursuant to subsection E of this section, he or she may appeal to the Ada County personnel hearing officer. A notice of appeal must be filed with the county personnel director within five (5) business days of receipt, by the employee, of the written decision of the elected official, as set forth above. The Ada County personnel director shall promptly notify the Ada County personnel hearing officer and the Ada County prosecuting attorney of the receipt of the appeal. The Ada County personnel hearing officer shall conduct a formal hearing on such appeal, within fifteen (15) business days of receipt of the notice of appeal by the county personnel director. If the employee is represented by counsel, an entry of appearance must accompany the filing of the appeal.

Within forty eight (48) hours, excluding weekends, after an appeal is filed, the Ada County hearing officer will conduct a prehearing conference to address matters involving discovery. Each party must submit written requests for discovery to the hearing officer at the prehearing conference, and the hearing officer may hear any objections to discovery or motions for protective orders at that time. At the conclusion of the pre hearing

conference, the hearing officer will issue a written order establishing time frames for the completion of all discovery. In all circumstances, discovery must be completed five (5) calendar days prior to the formal hearing. The date set for the hearing may be continued only upon the written consent of all parties to the proceeding and the hearing officer. Appropriate sanctions may be imposed by the hearing officer for failing to abide by the discovery time frames established in the hearing officer's order; for example, at the hearing a party may be prevented from offering for substantive purposes evidence sought in their discovery requests.

Five (5) calendar days before the date set for the hearing before the Ada County personnel hearing officer, a prehearing conference shall be held by the personnel hearing officer to: define the issue(s), identify the evidence and witnesses to be adduced at the hearing, discuss existing or potential problems and possible resolutions, and determine the anticipated length of the hearing. Each party shall bring to the prehearing conference a statement which sets forth the following:

1. A concise statement of the material facts supporting the parties' claims or defenses.

2. A statement of admitted or undisputed facts.

3. A statement of issues of law supported by a memorandum of authorities.

4. A list of summaries or schedules referring to attached, itemized exhibits concerning any subject matter which involves accounting, computation, chronology or similar data reasonably calling for orderly itemization, e.g., wages, income, expenses, operations, tax computations, disability periods, a detailed itemization of claimed losses or injuries and that data and reasons upon which an expert bases his opinion (not the opinion itself), which clearly reflects the claims, defenses or evidence of the party, together with references to the records of other sources upon which such summaries or schedules are based.

5. The names, addresses and telephone numbers of all witnesses, except impeaching witnesses.

6. Any other appropriate comments, suggestions or information for the assistance of the hearing officer in hearing the case and reaching a decision thereon, or which the party intends to rely on or submit at the hearing.

No further discovery shall be allowed. Material facts, witnesses, exhibits and other contents of which disclosure is required in the prehearing statement and which are not disclosed in the statement are not admissible at the hearing by the party failing to disclose.

M. The hearing before the Ada County personnel hearing officer shall be conducted in the same general manner as a hearing pursuant to the administrative

procedures act of the Idaho Code[1]. No continuance of the hearing shall be granted except for good cause, and upon the written consent of both parties and the hearing officer. An electronic recording device shall preserve the testimony presented at such hearing and all documents received in evidence shall be preserved for possible future proceedings. The employee and the elected official or executive employee may be represented by counsel.

N. Following the hearing before the Ada County personnel hearing officer, a written decision shall be rendered within fifteen (15) business days after the hearing date. The written decision shall set forth specific findings of fact and conclusions of law, based upon the testimony and evidence presented at the hearing. The Ada County personnel hearing officer has full authority to affirm, reverse or modify, wholly or in part, the previous employment action taken against the employee. The hearing officer is invested with full authority to order that the employee be reinstated to his prior position and status, with accrued pay and benefits, retroactive to the date of the employment action.

O. Either party shall have the right to appeal the decision of the Ada County personnel hearing officer to the district court of the fourth judicial district within sixty (60) days of the issuance of the written decision of the Ada County personnel hearing officer. (Ord. 383, 10-12-1999; amd. Ord. 386,12-14-1999; amd. Ord. 390, 5-23-2000)

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[1] § 67-5201 et seq., Idaho Code.

Appendix A

CHAPTER 7

~~COUNTY~~ PERSONNEL SYSTEM

ARTICLE H. GRIEVANCES[1]

SECTION:

1-7H-1: Grievance Procedures

1-7H-1: **GRIEVANCE PROCEDURES:** The following grievance procedures may be utilized only by nonprobationary, permanent county employees; provided, however, if the grievance is related to a "disability" as defined in the Americans with disabilities act, these grievance procedures may be utilized by all county employees regardless of whether the employee is probationary, temporary, permanent, full-time, part-time, classified or at will:

A. A classified employee shall utilize this procedure to resolve any difficulty or problem he or she may have with any aspect of his or her employment, with any disciplinary actions taken by his or her supervising executive employee or supervising elected official, and with any issues relating to an employee's "disability" as defined in the Americans with disabilities act; provided, however, matters of dismissal, suspension, demotion and/or inband reduction in pay, must be resolved in accordance with the procedures set forth in article G of this chapter.

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[1] Prior ordinance history: Ord. 110, 12-10-1980; Ord. 110-18-85, 1-21-1985; Ord. 141 8-29-1985; Ord. 219, 5-3-1990; Ord. 278, 9-13-1994.

Appendix A

B. A classified employee shall, within five (5) business days of learning of the occurrence, action or inaction, as the case may be, file with his or her immediate supervisor, a written grievance setting forth in detail the substance of the difficulty, the reasons therefor and possible solutions. The grievance may be submitted on forms supplied by the personnel department or on a plain sheet of paper. The grievance shall be presented to the employee's immediate supervisor. Failure to file a written grievance in accordance with this procedure and within the time specified shall constitute a waiver of the right to use this grievance procedure, and shall constitute a failure to exhaust administrative remedies.

C. The immediate supervisor shall, within five (5) business days of receipt of the grievance, respond in writing to the grievance and file a copy of the grievance and the supervisor's response thereto with the department's personnel file as soon as is practical.

D. If the employee is dissatisfied with the immediate supervisor's response or if the immediate supervisor does not issue a written response to the grievance within the time period stated, the employee shall have five (5) business days from the end of the previous five (5) business day period to appeal the response, or lack thereof, to the department or division supervisor in charge of the department or division in which the grievant is an employee, or such other person as the supervising elected official may designate. The designated executive employee shall respond in writing to each appeal, brought pursuant to this subsection, within five (5) business days of his or her receipt of the appeal. A copy of the appeal and the executive

employee's response thereto shall be filed with the supervising elected official as soon as practical.

E If the employee is dissatisfied with the response of the executive employee as aforesaid, the employee may, within five (5) business days, appeal the decision of the executive employee to the supervising elected official. The decision of the elected official shall be final in each case, with the exception of a grievance involving an employee's salary. In grievances involving an employee's salary, the employee may, within five (5) business days, appeal the decision of the supervising elected official to the board of Ada County commissioners for final action. The supervising elected official or board of county commissioners, as the case may be, shall render a written decision within ten (10) business days after receipt of the appeal.

F: Final resolution of each grievance shall be reduced to writing by the supervisor, executive employee, supervising elected official or board of county commissioners, as the case may be, and the original shall be presented to the employee and a copy thereof filed in the department personnel file. Copies of the final resolution of each grievance shall be filed with the Ada County personnel director and the department's personnel file as soon as is practical. (Ord. 383, 10-12-1999: amd. Ord. 401.10-31-2000)

Appendix A

CHAPTER7

COUNTY PERSONNEL SYSTEM

ARTICLE I. SICK LEAVE[1]

SECTION:

1- 71-1: Accrual
1-71-2: Use Of Sick Leave
1-71-3: Conditional Uses Of Sick Leave
1- 71-4: Maternity Leave
1- 71-5: Sick Leave Exchange

1-71-1: ACCRUAL:

A. Sick leave shall accrue to all full-time county employees covered by this chapter, including employees who are serving their entry-probationary or inter- or intrapromotional-probationary period, at the rate of eight (8) hours for each month of service. Sick leave shall be allowed to accumulate to a maximum of three hundred thirty six (336) hours. Employees who normally work a shift schedule of twenty four (24) hours on duty and forty eight (48) hours off shall accrue sick leave at the rate of eleven (11) hours per month; maximum accumulation will be four hundred sixty two (462) hours.

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[1] Prior ordinance history: Ord. 110, 12-10-1980; Ord. 110-15-84, 11-14-1984; Ord. 162, 12-17-1986; Ord. 179, 8-24-1987; Ord. 219, 5-3-1990; Ord. 227, 11-8-1990; Ord. 244, 4-2-1992; Ord. 273, 3-24-1990; Ord. 278, 9-13-1994; Ord. 360,6-16-1998.

Appendix A

B. Sick leave shall not accrue to any employee on any kind of leave of absence without pay, suspension without pay or layoff. Sick leave shall accrue while an employee is on approved leave with pay, on approved vacation leave, on approved military leave with pay and on approved sick leave. Sick leave shall not be taken in less than one-half (½) hour increments.

C. Classified employees hired as part-time employees, including part-time employees who are serving their entry-probationary or inter- or intrapromotional-probationary period, who usually work twenty (20) or more hours per week, shall accrue sick leave at the rate of 0.0462 times the total hours worked per month.

D. All accrued sick leave shall be forfeited at the time of separation from county service and no official or employee shall be reimbursed for sick leave at the time of separation.

E. Sick leave shall be taken on a workday basis. Regularly scheduled days off and officially designated holidays falling within a period of sick leave shall not be counted against sick leave. Sick leave shall not be taken in advance of being earned, by any county employee covered by this chapter, regardless of their status as an entry-probationary, a promotional-probationary or a permanent employee.

F. In cases where absences for sick leave exceed three (3) consecutive working days, the elected official or department head may require verification by a physician or other authorized practitioner.

G. If absence for illness or injury extends beyond the sick leave accrued to the credit of the employee, such additional time may be charged to vacation leave. If all sick leave and vacation leave is used, the employee may be granted leave without pay. (Ord. 380, 9-7-1999; amd. Ord. 383,10-12-1999)

1-71-2: **USE OF SICK LEAVE:**

A. It is the policy of Ada County that sick leave shall be used only when medically necessary. Therefore, except for the use of sick leave specified in subsection B of this section, an employee shall be limited to four (4) uses of sick leave in a twelve (12) month period. Such use of sick leave shall not exceed ten (10) days total in a twelve (12) month period.

B. The limitations on use of sick leave set forth above do not apply when sick leave is used by an employee for the following reasons:

1. Inpatient hospital care and related convalescence.

2. Outpatient hospital care and related convalescence.

3. Sick hours used for scheduled doctor appointments or physical therapy unless such sessions exceed more than half an employee's work day.

4. Conditional use of sick leave as provided in section 1-71-3 of this article.

5. Sick leave used for an ongoing medically diagnosed illness.

C. Except for sick leave used as provided in subsection B of this section an employee who exceeds four (4) uses of sick leave in a twelve (12) month period shall be placed on disciplinary review.

D. An employee on disciplinary review for violation of sick leave policy, shall accrue sick leave as provided in subsection 1-71-1¯A of this article, but shall not use sick leave except as provided in subsection B of this section. Further use of sick leave except as provided in subsection B of this section shall result in a notice of intent to terminate employment as provided in section 1-7G-3 of this chapter.

E. An employee on disciplinary review for violation of sick leave policy shall not be eligible for any increase in pay (merit or step) during any fiscal year in which the disciplinary review is imposed, nor for the fiscal year following. (Ord. 380, 9-7-1999)

1-71-3: **CONDITIONAL USES OF SICK LEAVE:**

A. Classified employees may use sick leave when, under compelling and necessary circumstances, they must administer aid and comfort to an immediate member of the family or when an immediate member of the family is quarantined, or when the employee is using family and medical leave as outlined in article K of this chapter. Immediate members of the family shall be limited to, for the purposes of sick leave usage, spouses, natural or adoptive parents of the employee, natural and adopted children living with an employee, permanent household members living with an employee on a permanent basis and temporary household

members over whom the employee has charge and who are living with an employee on a temporary basis. Elected officials and department heads shall consider requests for sick leave usage for immediate family members on a case-by-case basis; provided, however, requests for sick leave usage relating to family and medical leave shall conform to such leave policies as outlined in article K of this chapter. In cases where sick leave usage exceeds two (2) consecutive working days, the elected official or department head may require a physician's or other licensed practitioner's verification of the illness or injury and a statement that it is compelling and necessary that the employee administer aid and comfort to the immediate family member including the expected length of time such aid and comfort is compelled and necessary.

B. In case of death in the employee's immediate family, the employee shall be allowed to use three (3) days of accrued sick leave for bereavement purposes relating to the death of an employee's immediate family member. However, the supervising elected official or department head may allow, at his or her discretion, an additional one or two (2) days of sick leave for the purpose of traveling long distances to and from the place of death and/or funeral. Such allowances of sick leave usage shall be limited to deaths of spouses, natural and adopted children, stepchildren, parents, stepparents, siblings, stepsiblings, grandparents and grandchildren. Such leave shall be charged to the employee's accrued sick leave. Employees who wish to take leave from work for deaths of other relatives or of friends may take either vacation leave or leave without pay.

C. Employees may use their accrued sick leave for only the first five (5) days, that is, the five (5) day waiting/elimination period after making application for workers' compensation benefits as may be provided by the county.

D. Employees making application for disability benefits as may be provided by the county must exhaust all accrued sick leave prior to receiving any paid disability benefits. (Ord. 380, 9-7-1999; amd. Ord. 383,10-12-1999)

1-71-4: **MATERNITY LEAVE:** Disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth and recovery therefrom are, for all job-related purposes, temporary disabilities. (Ord. 380, 9-7-1999; amd. Ord. 383, 10-12-1999)

1-71-5: **SICK LEAVE EXCHANGE:**

A. Intradepartmental promotional-probationary employees and permanent employees only shall be allowed to exchange their unused sick leave for vacation leave, compensatory time off, or the cash equivalent or any combination thereof, at the rate of three for one (3:1), that is three (3) hours of unused sick leave for one hour of vacation leave, compensatory time off, or the cash equivalent or any combination thereof. Sick leave converted to vacation leave, compensatory time off, or cash shall then be deducted from the employee's available sick leave.

B. An eligible employee shall not be allowed to exchange unused sick leave if:

Appendix A

1. He or she has less than one hundred twenty three (123) hours of unused sick leave;

2. The exchange would reduce his or her unused sick leave balance below one hundred twenty (120) hours as of July 31 of the year in which the request for sick leave exchange is made; or

3. Notice of intent to terminate the employment relationship has been provided, orally or in writing, by either the county or the employee.

C. Exchanges of unused sick leave for a fraction of an hour of vacation leave, compensatory time off, or the cash equivalent; for example, seven (7) hours' sick leave for 2.33 hours of compensatory time off or the cash equivalent. shall not be allowed.

D. The employee's supervising elected official or department head shall have sole discretion to determine if the exchange shall be for vacation leave, compensatory time off, or the cash equivalent, or any combination thereof.

E. Exchanges of unused sick leave must be requested in writing and submitted to the employee's supervising elected official or department head no sooner than July 15 and no later than July 31 of each year, and will not become effective unless the requesting employee remains employed by Ada County after August 1 of the year in which the request for exchange of sick leave was made. (Ord. 380,9-7-1999; amd. Ord. 383,10-12-1999)

Appendix A

CHAPTER 7

COUNTY PERSONNEL SYSTEM

ARTICLE J. VACATION LEAVE[1]

SECTION:

1-7J-1: Accrual
1-7J-2: Use
1-7J-3: Probationary Employees
1-7J-4: Part-Time Employees

1-7J-1: **ACCRUAL:**

A. Vacation time shall not accrue to any employee on any kind of leave of absence without pay, suspension without pay or layoff or when working overtime.

B. The rate at which employees covered by this chapter shall accrue vacation leave will be in the following manner:

Years Of Continuous Service	Rate	Maximum Accrual
Less than 5 years	8 hours/month or 96 hours/year	192 hours

[1] Prior ordinance history: Ord. 110, 12-10-1980; Ord. 110-3-84, 1-4-1984; Ord., 2-29-1984; Ord. 110-13-84, 8-22-1984; Ord. 110-14-84, 9-12-1984; Ord. 149, 4-2-1986; Ord. 173, 6-22-1987, eff. retroactive to 1-1-1987; Ord. 179,8-24-1987; Ord. 219, 5-3-1990; Ord. 278, 9-13-1994; Ord. 307, 7-30-1996.

Appendix A

More than 5 years but less than 10 years	10 hours/month or 120 hours/year	240 hours
More than 10 years but less than 15 years	12 hours/month or 144 hours/year	288 hours
More than 15 years but less than 20 years	14 hours/month or 168 hours/year	336 hours
More than 20 years	16 hours/month or 192 hours/year	384 hours

C. EMS field personnel shall accrue vacation leave at the following rates:

Years Of Continuous Service	Rate	Maximum Accrual
Less than 5 years	14.66 hours/month or 176 hours/year	272 hours
More than 5 years but less than 10 years	16.66 hours/month or 200 hours/year	320 hours
More than 10 years but less than 15 years	18.66 hours/month or 224 hours/year	368 hours
More than 15 years but less than 20 years	20.66 hours/month or 248 hours/year	416 hours
More than 20 years	22.66 hours/month or 272 hours/year	464 hours

D. Vacation leave shall accrue to all full-time county employees covered by this chapter at the rates listed above for each month of service. EMS field personnel must work or be on approved leave with pay for at least four (4) shifts, a shift being twenty four (24) continuous work hours, per month of service to accrue the vacation leave for that month.

E. Years of service credit for purposes of vacation leave accrual shall not be allowed for any period(s) of prior service with the county which ended with an employee's termination of employment with the county, for whatever reason(s). Provided, however, that years of service credit for purposes of vacation leave accrual shall be allowed for periods of prior service if an employee was reinstated following such break in service, pursuant to section 1-7D-7 of this chapter. (Ord. 383,10-12-1999)

1-7J-2: **USE:**

A. Vacation leave shall be transferable from department to department only to the extent that it is accrued and accumulated; provided, however, EMS field personnel being transferred to another department shall be compensated and cashed-out by the emergency medical services department at the time of transfer for their accrued but unused vacation leave which exceeds the maximum accrual limits established in subsection 1-7J-1 B of this article for other classified employees.

B. Vacation leave shall not be earned, accrued or accumulated during any pay period in which the

maximum accruals and accumulations provided by this article have been met.

C. Vacation leave not taken shall be compensated for at the time of separation only to the maximum accruals and accumulations allowed in subsections 1-7 J-1 Band C of this article.

D. Vacation leave shall be taken on a workday basis and only when approved by the employee's supervisor, department head or supervising elected official. Officially designated holidays falling within a period of vacation leave shall not be counted against vacation leave with the exception of EMS field personnel for whom such holidays shall be counted against vacation leave. Vacation leave shall not be taken in advance of being earned. Vacation leave shall not be taken in less than one-half (½) hour increments. (Ord. 383,10-12-1999)

1-7J-3: **PROBATIONARY EMPLOYEES:**

A. Employees shall not accrue vacation leave during "entrance probation", as defined in subsection 1-7E-1 B of this chapter.

B. Upon successful completion of probationary service, employees that were formerly on entrance probation will accrue vacation leave at the rate established in subsection 1-7 J-1 B of this article retroactive to date of commencement of their probation.

C. Employees on "interdepartmental promotional probation", as defined in subsection 1-7E-1 B of this

chapter, shall be treated for purposes of this rule the same as employees on entrance probation as defined above.

D. Employees on "intradepartmental promotional probation", as defined in subsection 1-7E-1 B of this chapter, shall continue to accrue, and shall be able to use, vacation leave during the period of their probation at the same rate and in the same manner as they did prior to promotion. (Ord. 383, 10-12-1999)

1-7J-4: **PART-TIME EMPLOYEES:**

A. Classified employees who meet the definition of part-time employees and who regularly work twenty (20) or more hours per week, shall accrue vacation leave, effective October 1, 1996, at the rates listed below times the total hours worked per month up to the maximums, also listed below:

Years Of Continuous Service	Rate	Maximum Accrual
Less than 5 years	0.0462	192 hours
More than 5 years but less than 10 years	0.0577	240 hours
More than 10 years but less than 15 years	0.0692	288 hours
More than 15 years but less than 20 years	0.0807	336 hours
More than 20 years	0.0923	384 hours

Appendix A

Credit for years of continuous service with the county shall be retroactive to the county employee's date of hire.

Years of service credit for purposes of vacation leave accrual shall not be allowed for any period(s) of prior service with the county which ended with an employee's termination of employment with the county, for whatever reason(s). Provided, however, that years of service credit for purposes of vacation leave accrual shall be allowed for periods of prior service if an employee was reinstated following such break in service, pursuant to section 1-7D-7 of this chapter.

B. Part-time employees who later become permanent full-time employees shall, for purposes of vacation leave accrual only, be entitled to credit, as full-time years of service, all permanent part-time service during which the employee worked twenty (20) or more hours per week. No such credit will be permitted for any period of part-time service during which the employee worked less than twenty (20) hours per week. (Ord. 383,10-12-1999)

CHAPTER 7

COUNTY PERSONNEL SYSTEM

ARTICLE K. SPECIAL LEAVES[1]

[1] Prior ordinance history: Ord. 110, 12-10-1980; Ord. 110-17-85, 1-15-1985; Ord. 157, 11-12-1986; Ord. 166,4-16-1987; Ord. 173,6-22-1987, eft. retroactive to 1-1-1987; Ord. 186, 3-3-1988; Ord. 273, 3-24-1994;

Appendix A

SECTION:

1- 7K-1: Holidays
1-7K-2: Leave Of Absence Without Pay
1-7K-3: Leave Of Absence With Pay
1-7K-4: Court And Jury Duty
1-7K-5: Military Leave
1-7K-6: Family And Medical Leave

1- 7K -1: **HOLIDAYS:**

A. The legal holidays for the county are:

January 1	New Year's Day
Third Monday in January	Martin Luther King Day
Third Monday in February	Washington's Birthday
Last Monday in May	Decoration Day
July 4	Independence Day
First Monday in September	Labor Day
Second Monday in October	Columbus Day
November 11	Veterans Day
Fourth Thursday in November	Thanksgiving Day
December 25	Christmas

and any day so designated by the board. Employees in the office or department of the sheriff and employees of the detention division of the juvenile court services department shall not receive Columbus Day as a county holiday, but rather shall be granted one floating holiday; said floating holiday

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Ord. 278, 9-13-1994; Ord. 340, 9-2-1997; Ord. 361, 6-16-1998.

shall accrue on Columbus Day of each year and shall be used within one year of accrual.

B. In the event that a holiday occurs on a Saturday, the preceding Friday shall be a holiday, and if the holiday falls on a Sunday, the following Monday shall be a holiday.

C. Employees who do not work on a holiday declared by the board, regardless of the holiday being either a scheduled workday or a scheduled day off, shall be compensated in cash, compensatory time off, or a combination thereof, for the number of hours they would have otherwise worked had the holiday been a regular workday at the same rate they would regularly receive.

D. Employees who work on a holiday declared by the board, regardless of the holiday being a scheduled workday or a scheduled day off, shall be compensated in cash, compensatory time off, or a combination thereof, at the rate of two and one-half (2 ½) hours for each hour worked on the holiday; provided however, that EMS field personnel shall be compensated at the rate of one and one-half (1 ½) hours for each hour worked on the holiday. No additional compensation shall be due for such hours worked.

E. EMS field personnel shall not be entitled to holidays and are excluded from subsections A through C of this section. However, EMS field personnel shall be entitled to vacation leave as provided in subsection 1-7J-1C of this chapter.

F. Employees must regularly work twenty (20) or more hours per week to be eligible for county-paid holidays. (Ord. 383, 10-12-1999)

1-7K-2 **LEAVE OF ABSENCE WITHOUT PAY:**

A. A department head, upon written approval from the elected official responsible for said department and, after consulting with the board of county commissioners, may grant an employee leave of absence without pay for a period of time not to exceed six (6) months. However, leave of absence without pay shall be granted by the county if such leave is requested by eligible county employees for purposes relating to family and medical leave and the leave is consistent with the county's family and medical leave policy as outlined in this article.

B. Upon return from leave without pay, the department head may restore the employee to his/her former position and status or one of equivalent pay and status. However, the department head shall restore an eligible employee who is on family and medical leave to the same position he or she held at the time of taking such leave or to an equivalent position in accordance with the county's family and medical leave policy as outlined in this article.

C. Upon return from leave without pay, the employee shall be restored to the same status regarding annual leave. Time on leave without pay will not apply toward annual leave, sick leave or salary increases. (Ord. 383,10-12-1999)

Appendix A

1-7K-3: LEAVE OF ABSENCE WITH PAY:

A. A department head or an elected official responsible for a department or an office may grant, with the concurrence of the board, an employee leave of absence with pay and fringe benefits when such leave is in the best interest of or will benefit the county or when an employee is approved for workers' compensation supplemental pay and benefits.

B. During an approved leave of absence with pay, an employee will continue to accrue vacation leave and sick leave, to receive years of service credit for purposes of vacation leave accrual, and to receive appropriate salary increases.

C. The salary or wage to be paid to an employee on an approved leave of absence with pay shall be negotiated by the employee and the department head or elected official responsible for the department or office, and approved by the board; provided, however, the salary or wage to be paid to an employee approved for workers' compensation supplemental pay and benefits shall be as provided in subsections 1-7C-10A and B of this chapter. If the employee is compensated by another entity during the leave of absence with pay, the county shall not pay more than the difference between the employee's county gross monthly salary, excluding fringe benefits, and the employee's gross monthly salary or wages paid by the other entity.

D. An employee placed on an approved leave of absence with pay for the purpose of attending courses of advanced professional study shall sign a document

certifying that he or she will return to employment with the county for twice such period of time as on leave with pay. The employee shall reimburse the county for salary and other benefits paid during the period he or she is on leave of absence with pay if he or she does not comply with this section. (Ord. 383,10-12-1999)

1-7K-4: **COURT AND JURY DUTY:**

A. Leave Of Absence With Pay: A classified employee shall be considered on leave with pay for the period of time when he or she is directed by proper authority to:

1 .Appear as a witness for a governmental entity;

2. Attend court or other hearings in connection with their official duties; or

3. Serve as a member of a jury.

However, any payment for such duties other than the employee's salary shall be endorsed over to the county. If an employee fails to do so, the employee's pay shall be reduced by the amount of any such payment.

B. Leave Of Absence Without Pay: A classified county employee shall be considered on leave without pay when he or she appears in or attends court for any reason other than as provided for above; provided however, an employee on leave without pay for attendance in court for whatever purpose may use accrued annual leave or accrued compensatory time off instead of taking leave without pay. (Ord. 383,10-12-1999)

Appendix A

1-7K-5: **MILITARY LEAVE:**

A. An employee who is a member of the national guard or military reserve of the United States shall be entitled to a maximum of fifteen (15) calendar days' leave in anyone calendar year to participate in ordered and authorized field training under the national defense act.

B. Military leave shall not be charged to the employee's annual leave or any other benefits.

C. If the gross amount earned by the employee during military leave is less than his/her county gross salary for that period, the county will pay the difference. If the employee's pay during the leave is greater than his/her county gross salary for that period, it will be considered leave without pay, although benefits will be provided.

D Military leave must be approved by the appointing authority at least fifteen (15) calendar days in advance except in emergencies and such request for leave must be supported by a copy of orders or other satisfactory document. (Ord. 383, 10-12-1999)

1-7K-6: **FAMILY AND MEDICAL LEAVE:**

A. Eligibility: County employees who have been employed by the county for at least twelve (12) consecutive or nonconsecutive months of service and who have worked for the county for at least one thousand two hundred fifty (1,250) hours during the twelve (12) month period immediately preceding the commencement of the leave shall be eligible for family and medical leave.

Appendix A

B. Leave Entitlement:

1. Eligible county employees are entitled to a total of twelve (12) workweeks of family and medical leave during a twelve (12) month period. Such twelve (12) month period shall be measured backward from the date an employee uses any family and medical leave. Each time an employee takes family and medical leave, the remaining leave entitlement would be any balance of the twelve (12) weeks which has not been used during the immediately preceding twelve (12) months.

2. Eligible county employees who are also husband and wife may take only a combined total of twelve (12) weeks' leave during such twelve (12) month period, if the leave is taken for the birth of a child, to care for a child after birth, for the placement of a child for adoption or foster care, to care for a child after placement for adoption or foster care or to care for a parent with a serious health condition. This limitation does not apply to family and medical leave taken by either spouse to care for the other, to care for a child with a serious health condition or for his or her own serious health condition.

C. Reasons For Family And Medical Leave: Eligible county employees may take family and medical leave to care for employees': newborn babies after birth; newly adopted children and newly placed foster care children; and/or spouses, sons, daughters or parents who have serious health conditions. Such leave may also be taken because employees have serious health conditions which make them unable to perform the essential functions of their positions.

Appendix A

D. Substitution Of Sick Leave, Compensatory Time Off And Vacation Leave: Eligible county employees must first substitute and use all but sixteen (16) hours of accrued paid sick leave for their family and medical leave. After substituting and exhausting all but sixteen (16) hours of accrued paid sick leave, employees must substitute and use all of their accrued compensatory time off for their family and medical leave. Following which, employees must then substitute and use all of their accrued paid vacation leave prior to being authorized unpaid family and medical leave.

E. Intermittent Leave And Reduced Leave Schedules:

1 .When medically necessary, elected officials or executive employees delegated the responsibility for personnel actions shall allow employees to take intermittent leave or to take leave on a reduced leave schedule.

2. If the family and medical leave is being taken because of the birth or placement of a child for adoption or foster care, elected officials or executive employees delegated the responsibility for personnel actions may allow or disallow employees to take intermittent leave or to take leave on a reduced leave schedule.

F. Benefits:

1. Eligible county employees shall continue to receive county-paid medical, dental and vision insurance coverages, as may be provided active employees, during the family and medical leave. However, if

employees elect to retain health insurance coverage for their dependents during family and medical leave, they must continue to pay their respective premium contributions for such coverage. If employees elect to not retain health insurance coverage for their dependents during family and medical leave, they shall be entitled to reenroll their dependents without waiting any preexisting condition periods, physical examinations or insurance carriers' ability to reject such reenrollment. If employees fail to return to full- or part-time work or on a reduced leave schedule, within thirty (30) days after taking unpaid family and medical leave, they may be required to repay the county for all health insurance premiums paid for them by the county during the unpaid family and medical leave.

2. Life insurance and disability insurance shall not be maintained at county expense for employees on family and medical leave. If employees on medical and family leave elect to continue such insurance coverages, they must pay the respective premiums.

G. Employment Protection:

1. Eligible employees shall be returned to the same position held at the time of taking family and medical leave or to an equivalent position with equivalent pay, benefits and working conditions, and substantially similar duties, responsibilities and authority.

2. Key employees, however, are not required to be returned to the same position the key employee held when he or she began their family and medical leave, or to an equivalent position, if the return to employment,

not the key employee's absence, would cause substantial and grievous economic injury to the operations of the county.

H. Requests For Leave: Employees shall provide the county with at least thirty (30) days' advance notice before family and medical leave begins, if the need for the leave is foreseeable. If such advance notice is not practicable, it shall be given as soon as practicable. Such notice shall be at least verbal and clearly indicate that he or she needs family and medical leave and the expected beginning and ending dates of such leave. If the leave is being requested because of a serious health condition, the employee's supervisor, department head and elected official may inquire further to determine if the medical condition meets the definition of a serious medical condition, and shall request medical certification by a health care provider.

I. Health Care Provider Certification: The elected official or executive employee delegated the responsibility for personnel actions shall require the health care provider to certify that the employee is needed to care for the family member, that the employee is unable to perform the essential functions of his or her position, and/or that intermittent leave or a reduced leave schedule is medically necessary.

J. Notification To Employees Requesting Leave: After an employee requests family and medical leave, the elected official or executive employee delegated the responsibility for personnel aetions shall provide the employee with a written notice. This notification shall be given to the employee immediately, and before the

leave begins, unless the county does not have at the time such leave begins sufficient information as to the employee's reason for taking leave. Such notification shall include:

1. A statement that the requested leave will be counted against the employee's twelve (12) workweek family and medical leave entitlement;

2. A requirement for the employee to furnish medical certification of a serious health condition and notification that if the employee fails to provide complete certification, the request for leave may be denied until the required certification is provided;

3. A notification that the county requires the employee to substitute and use all but sixteen (16) hours of accrued paid sick leave, all accrued compensatory time off and all accrued vacation leave, and of the conditions relating to the substitutions;

4. Any requirement for the employee to make premium payments to maintain health insurance benefits, if applicable, and information about how such payments may be made;

5. Any requirement for the employee to present a fitness-for-duty certificate to be returned to work;

6. Notification of the employee's right to return to the same or an equivalent position upon return from leave;

7. Notification of the employee's potential liability for payment of health insurance premiums paid by the

county during the employee's unpaid family and medical leave, if the employee fails to return to work; and

8. Any other requirements for periodic reports of the employee's status and intent to return to work or for recertification relating to the employee's serious health condition, if applicable.

K Notification To Key Employees Requesting Leave:

1. In addition to the notice given other county employees requesting family and medical leave, a key employee shall also be given notification that he or she qualifies as and has been designated as a key employee, and that the county may deny a key employee the opportunity to return to work, if the key employee's return to work would cause substantial and grievous economic injury to the operations of the county. This notice shall also include notification that the key employee will continue to be entitled to county-paid medical, dental and vision insurance coverages until either the key employee gives notice that he or she no longer wishes to return to work or the county actually disallows the key employee's return to work at the end of the family and medical leave.

2. If the elected official or executive employee determines that substantial and grievous economic injury to the operations of the county would result from the key employee's return to work, the above notification shall also include notification: a) of such determination and the basis for it; b) that the county will not allow the key employee to return to work at the

end of the leave period; c) that the county cannot and is not denying the eligible leave; and d) that the key employee will be provided a reasonable time in which to return to work, after receipt and consideration of this notice. This notice shall be delivered in person or sent by certified mail to the key employee.

3. Even after the above notice has been delivered, the affected key employee is still entitled to request to be returned to work at the end of the leave period; and, the elected official or executive employee shall again determine if the key employee's return to work would cause substantial and grievous economic injury based upon the facts at that time. If it is still determined that such economic injury would result, the county shall personally or by certified mail notify the key employee in writing of this final determination.

L. Interference, Discrimination Or Retaliation: County employees, supervisors, managers, department heads and elected officials shall not:

1. Interfere with employees' inquiries about and exercise of their rights or legal proceedings as they relate to family and medical leave;

2. Discourage, restrain nor deny employees' use of family and medical leave, or induce employees to waive their rights as they relate to family and medical leave;

3. Use employees' taking of family and medical leave as a negative factor in any employment decision or action; and/or

4. Discriminate or retaliate against, or discipline or discharge employees for opposing or complaining about any unlawful practice, filing a grievance or charge, instituting or causing to be instituted any proceeding, or giving information in connection with or testifying in any inquiry or proceeding, as it relates to family and medical leave.

M. Mandatory Grievances: Any county employee who feels that the provisions of this chapter have been violated, or otherwise disagrees with decisions made pursuant to this chapter, must pursue a grievance through the Ada County grievance procedures set forth in article H of this chapter, as may be amended from time to time, before pursuing any claim or appeal action in federal or state court. (Ord. 383,10-12-1999)

CHAPTER 7

COUNTY PERSONNEL SYSTEM

ARTICLE L. STANDARDS OF CONDUCT[1]

SECTION:

1-7L- 1: Code Of Ethics
1-7L- 2: Conflict Of Interest
1-7L- 3: Nepotism
1-7L-4: Gifts And Gratuities
1-7L- 5: Disposition Of County Property

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[1] Prior ordinance, history: Ord. 110, 12-10-1980; Ord. 110-16-85, 1-2-1985; Ord. 166, 4-16-1987; Ord. 278, 9-13-1994.

Appendix A

1-7L- 6: Membership On Boards Or Commissions
1-7L- 7: Dissemination Of Information
1-7L- 8: Dress And Appearance
1-7L- 9: Administration
1-7L-10: Violations

1-7L-1: **CODE OF ETHICS:** All employees shall conduct themselves in a professional manner and shall refrain from engaging in any activities, employment or business which might reasonably be interpreted, by the people of Ada County, as interference with or compromise of their positions as county employees serving the public interest. (Ord. 383,10-12-1999)

1- 7L-2: **CONFLICT OF INTEREST:** County employees shall not take any official action nor make any decision or recommendation if the effect of such would be to the private pecuniary benefit of the employee or a member of the employee's household or a business with which the employee or a member of the employee's household is associated unless the pecuniary benefit arises out of:

A. An interest or membership in a particular business, industry, occupation or class required by law as a prerequisite to the holding by the employee;

B. Any action in the employee's official capacity which would affect to the same degree a class consisting of an industry or occupation group in which the employee or a member of the employee's household or business with which the employee is associated is a member or is engaged;

C. Any interest which the employee has by virtue of his or her profession, trade or occupation where his or her

interest would be affected to the same degree as that of a substantial group or class of others similarly engaged in the profession, trade or occupation; or

D. Any action by an employee upon any revenue measure, any appropriation measure or any measure imposing a tax when similarly situated members of the general public are affected by the outcome of the action in a substantially similar manner and degree.

For the purposes of this section the definitions found in Idaho Code section 59-703 shall control to the extent applicable. (Ord. 383,10-12-1999)

1-7L-3: **NEPOTISM:**

A. No county employee shall appoint, supervise, have influence over or otherwise employ for compensation payable from public funds, any member of his or her immediate family. Employees involved in administrative and/or support functions related to the job training partnership act (JTPA) must also comply with Idaho department of employment rules and regulations related to nepotism and the JTPA program rules and regulations.

B. For nepotism purposes, the term "member of immediate family" includes: wife, husband, daughter, daughter-in-law, son, son-in-law, mother, mother-in-law, father, father-in-law, sister, sister-in-law, brother, brother-in-law, aunt, uncle, niece, nephew, grandmother, grandfather, granddaughter, grandson, stepparent, stepchild. (Ord. 383,10-12-1999)

Appendix A

1- 7L-4: **GIFTS AND GRATUITIES:** No employee shall accept any gifts, services or other privileges offered or given by any person or organization which:

A. Is under contract with the county for provisions of goods and services.

B. Is or could be regulated or administered by an agency of county government.

C. Reasonably may be expected to have any future interest in securing contracts or being a vendor of supplies, equipment or services to the county.

An employee who is offered or receives such gifts, services or privileges shall decline or return them or, if more appropriate, may donate them to a charitable or nonprofit organization. This provision does not apply to greeting cards, flowers, calendars or candy which may be sent to an entire department of county government at Christmas time or upon special occasions. (Ord. 383, 10-12-1999)

1-7L-5: **DISPOSITION OF COUNTY PROPERTY:**

A. A county employee is prohibited from purchasing county property by bidding at county-held public auctions if the sale resulting from the auction is made by, through or on behalf of the department in which he or she is an employee. Other county employees may participate in such auctions.

B. A county employee shall not participate as a bidder at county-held auctions while on county time even though participation is not prohibited. (Ord. 383,10-12-1999)

Appendix A

1-7L-6: **MEMBERSHIP ON BOARDS OR COMMISSIONS:** (Rep. By Ord. 166, 4-16-1987)

1-7L-7: **DISSEMINATION OF INFORMATION:** Every employee shall exercise his/her best judgment in relating any information to which he/she may be privy in his/her position as a county employee to individuals, organizations, businesses or the press. No employee shall release information deemed confidential by the courts or Idaho Code. Information pertinent to competitive bidding by the county shall be given to all vendors in a like manner. (Ord. 383,10-12-1999)

1-7L-8: **DRESS AND APPEARANCE:** Employees are expected to present an attractive appearance. All employees, especially those who have daily contact with the public, are expected to wear presentable attire coupled with personal cleanliness and neatness. The elected official shall determine, in accordance with the requirements of a particular job, what constitutes suitable attire for the employees in their office. Personnel on special assignments may be exempted from the above requirements. (Ord. 383, 10-12-1999)

1-7L-9: **ADMINISTRATION:** An elected official or department head may define other situations which may require a more strict standard of conduct for his/her particular department. The primary responsibility for following these standards of conduct is that of the employee. It shall be the employee's responsibility to notify his/her supervisor of any activity which could be a breach of these standards. Interpretations of disputes regarding conduct under this standard of conduct shall be referred to the county personnel office or those departments responsible to the county

commissioners, or to the applicable elected official. (Ord. 383,10-12-1999)

1-7L-10: **VIOLATIONS:** Any employee who violates these standards of conduct may be subject to immediate dismissal, suspension, demotion or other adverse action. (Ord. 383, 10-12-1999)

APPENDIX B – ADA COUNTY HEARING PROCEDURES, § 1-14-1 THROUGH § 1-14-8, ADA COUNTY CODE (CHAPTER 14)

CHAPTER 14

HEARING PROCEDURES

SECTION:

1-14-1: Purpose
1-14-2: Definitions
1-14-3: Submission Of a Proposed Decision
1-14-4: Conduct Of Hearing
1-14-5: Record
1-14-6: Reopening The Record
1-14-7: Decision By The Board
1-14-8: Applicability

1-14-1: **PURPOSE:** The purpose of this Chapter shall be to provide a procedure by which the Board shall conduct hearings in land use, personnel, medical indigency, and other matters which, by Federal, State, or County law, require the receipt of evidence, whether testimony, documents, or otherwise, and a response from the Board in the form of a written decision based on the record. (Ord. 293, 5-24-95)

1-14-2: **DEFINITIONS:** For the purposes of this Chapter, words shall have the following meanings:

APPLICANT/ APPELLANT:	The person or entity seeking a decision from the Board.
BOARD:	The Board of Ada County Commissioners.

Appendix B

STAFF: Any Ada County officer or employee present during the hearing (Ord. 293, 5-24-95)

1-14-3: **SUBMISSION OF A PROPOSED DECISION:**

The Board encourages any interested party to a hearing before the Board to submit a brief synopsis of the matter, argument, and a proposed decision (including findings of fact and conclusions of law, if applicable). Any synopsis, argument or proposed decision must be received by and lodged with the Board prior to commencement of the hearing. Failure to submit documents contemplated hereunder shall not prejudice an interested party. (Ord. 293, 5-24-95)

1-14-4: **CONDUCT OF HEARING:** Hearings before the Board shall be conducted in general conformance with the following procedure:

A. Generally: The Board may limit testimony and scope of the hearing as necessary. The Board, or its designee, if any, may at any time during the hearing freely inquire of anyone at the hearing, including staff.

B. Report: Hearings before the Board shall commence with a report from staff. The report may be written or oral, at the pleasure of the Board, and may include testimony from witnesses. The report shall contain recommendations and a proposed decision for the Board's review, including proposed findings of fact and conclusions of law in a form directed by the Board for such matters, if any. The Board shall not be bound by the recommendations of staff.

C. Applicant/Appellant Comments: At the conclusion of staff's comments, if any, the applicant/appellant, and those favoring the applicant/appellant's position shall be allowed an opportunity to present testimony, documents, and other evidence which supports his or her position. An applicant/appellant may be represented by counsel. Except as provided in subsection E, at the Board's discretion, testimony for and against an application may be presented in rotating order.

D. Opponent And General Comments: When the applicant/appellant has concluded his or her comments, those opposing the applicant/appellant's position or having general questions shall be provided an opportunity to present testimony, documents, or other evidence refuting the evidence presented on behalf of the applicant/appellant.

E. Applicant/Appellant Rebuttal: When the opponents, if any, have all concluded their comments, the applicant/appellant shall be allowed a brief period for rebuttal. (Ord. 293, 5-24-95)

1-14-5: **RECORD:** The staff report shall automatically become part of the record as shall any documents submitted by the applicant/appellant or any opponents, as shall all testimony given at the hearing. At conclusion of the hearing, the Board shall close the record unless the Board determines, in its discretion, additional evidence is required, in which event, it may proceed as follows: close the record with the exception of allowing the submission of specifically requested information, leave the entire record open for the submission of additional

evidence to a date certain at which time it will automatically be closed without further action of the Board, or continue the hearing to a date certain for the purpose of receiving additional evidence and conducting such further proceedings as may, in its discretion, be advisable. (Ord. 293, 5-24-95)

1-14-6: **REOPENING THE RECORD:** Prior to issuing a written decision, the Board may, for good cause demonstrated, reopen the record for the purpose of receiving additional evidence. An interested party may seek to reopen the record by filing a timely motion to reopen the proceedings containing information therein to demonstrate good cause and paying any costs which will be incurred by the County to comply with applicable law. The Board shall decide an applicant/appellant's motion to reopen the record within five (5) days of the receipt thereof. The Board may, within the time allowed herein, reopen the record for good cause on its own motion. If the Board determines to reopen the record, it shall thereafter comply with applicable law, if any, governing notice and hearings. (Ord. 293, 5-24-95)

1-14-7: **DECISION BY THE BOARD:** When the record has been closed, the Board shall take the matter under advisement for the purpose of deliberating towards a decision based on the record. After deliberating, the Board may then immediately render a written decision complying with applicable law or may continue the matter to a date and time certain for further deliberation and decision. Provided, if the matter is continued, the Board shall render a written decision within thirty (30) days, unless a shorter period is provided by law, in which case the shorter period shall apply. The Board shall deliberate and make decisions at meetings which comply with the Open Meeting Act, Idaho Code section 67-2340, et

seq., as it may be amended from time to time. (Ord. 293, 5-24-95)

1-14-8: **APPLICABILITY:** This Chapter shall apply to any matter currently pending for which no hearing has been held and to all other qualifying matters hereafter considered by the Board. (Ord. 293, 5-24-95)

APPENDIX C – ADA COUNTY ORDINANCE NO. 612

ORDINANCE NO. 612

AN ORDINANCE AMENDING ADA COUNTY CODE TITLE I, CHAPTER 7, TO DELETE REFERENCES TO AN ADA COUNTY PERSONNEL HEARING OFFICER IN COMPLIANCE WITH STATE SUPREME COURT DECISIONS, TO ADD CERTAIN DUE PROCESS PROTECTIONS TO THE HEARING BEFORE EACH ELECTED OFFICIAL, AND TO PROVIDE EXECUTIVE EMPLOYEES SO DESIGNATED BY EACH ELECTED OFFICIAL WITH CERTAIN MANAGEMENT RESPONSIBILITIES IN CONNECTION WITH CLASSIFIED EMPLOYEES.

BE IT HEREBY ORDAINED THAT ADA COUNTY CODE § 1-7G-3: DISMISSALS, SUSPENSIONS, DEMOTIONS AND INBAND REDUCTIONS IN PAY IS HEREBY AMENDED AS FOLLOWS:

Provisions of section 1-7G-2 of this article are not a prerequisite to action under this section.

A. Employees in classified service with probationary status may be dismissed, suspended, demoted and/or administered an inband reduction in pay in accordance with article E of this chapter. Any employee in classified service with permanent status may be dismissed, suspended, demoted and/or administered an inband reduction in pay for good cause, which shall include, but not be limited to, any one or a combination of the following acts or omissions which occur during the period of the employee's employment with Ada County:

Appendix C

1. Failure to perform the duties and carry out the obligations imposed by the federal or state constitutions; federal or state statutes, rules or regulations; county ordinances; or rules and policies and procedures of his or her department or office.

2. Inefficiency, incompetency or negligence in the performance of his or her duties which interferes with the proper operation of his or her department or office, or failure to meet work standards for his or her job.

3. Failure to perform the essential functions of his or her employment position for any reason after the county has made reasonable accommodations as required by law.

4. Refusal to accept a reasonable and proper assignment from an authorized supervisor, or failure to perform assigned tasks within required time limits.

5. Insubordination or conduct detrimental to good order and discipline in the department or office, or conduct unbecoming of a county employee.

6. Being under the influence of any form of drug, alcohol or controlled substance, without a prescription or as authorized by law, while on duty.

7. Careless, negligent or improper use of, or unlawful conversion of, county property, equipment or funds.

8. Conviction of misconduct in office, or conviction of a felony.

Appendix C

9. Acceptance of gifts in exchange for influence or favors given in an official capacity.

10. Abuse or improper use of sick leave privileges.

11. Failure to report for duty at the assigned time and place.

12. Unauthorized disclosure of information from official, nonpublic records or nonpublic information otherwise obtained in the course and scope of the employee's job.

13. Absence without proper authorization of leave.

14. Misstatement or deception in application for employment.

15. Failure to obtain or maintain a current license or certificate lawfully required as a condition of performance of duties.

16. Political activity which is disruptive of the employee's mission and duties or that of his or her department or office.

17. Use of any influence which violates the principle of this merit system in an attempt to secure a promotion or other privileges for individual advantage or gain.

18. Violations of the standards of conduct as set forth in article L of this chapter.

19. Violation of Ada County's harassment and discrimination policy or retaliation against another

employee for filing a report of harassment or discrimination.

20. Knowingly making a material misstatement or a materially misleading statement in an official report.

21. Making or repeating a material misstatement or materially misleading statement about a county employee or official with knowledge that the statement is untrue or misleading or making or repeating a material misstatement or materially misleading statement about a county employee or official with reckless disregard as to whether the statement is untrue or misleading.

22. Violating the family and medical leave act with respect to interference, discrimination and retaliation as outlined in article K of this chapter.

23. Violation of federal or state copyright laws regulating, but not limited to, the unauthorized copying or distribution ("pirating") of personal computer (PC) software or data, and/or violation of any personal computer (PC) software licensing agreement.

24. Impeding, interfering with, or failing to cooperate in an official, internal or external administrative investigation conducted by or at the request of the county.

B. Whenever ~~an elected official or an~~the executive employee delegated the responsibility for personnel actions by his or her supervising elected official determines it necessary to dismiss, suspend, demote and/or administer an inband reduction in pay to a permanent employee in the classified system for one or more of the reasons set forth in

subsection A of this section, or other reason deemed sufficient by the ~~elected official~~executive employee, he or she shall provide written notification of the contemplated action to the employee, the county personnel director and the county prosecuting attorney. Such written notification of contemplated action shall include:

1. A detailed statement setting forth the charges, allegations of wrongdoing or alleged inadequacies of the employee.

2. A description of the employer's evidence.

3. A detailed statement of the disciplinary action to be taken (dismissal, suspension, demotion and/or inband reduction in pay) and the effective date thereof.

4. Notice to the employee that, except in cases of demotion, suspension for under thirty (30) days in duration, and/or inband reduction in pay, he or she shall be placed on administrative leave with pay effective upon receipt of the written notification of contemplated action.

5. That, if applicable, such administrative leave with pay status shall continue until the effective date given for the contemplated action, or if the employee exercises his or her right to appeal, upon receipt of the written decision of the supervising elected official provided for in this ~~section~~article.

6. A copy of this article.

C. The dismissal, suspension, demotion and/or inband reduction in pay shall be effective no sooner than five (5)

business days after receipt of the written notification of contemplated action by the affected employee. A permanent employee in the classified system may appeal the action to the ~~elected official~~executive employee who has supervisory control over the department or office which employs that individual. The employee shall have five (5) business days after receipt of written notice of contemplated action to personally deliver a written response to the charges to the ~~elected official or~~ executive employee who has signed the notice, the county personnel director and the county prosecuting attorney. This response shall constitute an appeal of the action taken against the employee. Failure of the employee to respond within the specified time period shall constitute a waiver of any right to challenge the action.

D. Upon receipt of the written response from the employee requesting an appeal of the dismissal, suspension, demotion and/or inband reduction in pay, the ~~elected official~~executive employee who has supervisory control over the department shall conduct, within five (5) business days of receipt of the written response, an informal hearing for the purpose of allowing the employee to respond to the allegations made. The ~~elected official~~executive employee may conduct the hearing according to such procedures as he or she may establish in writing as long as any such procedures are not inconsistent with this chapter. The employee may be represented by an attorney, if he or she so desires. The executive employee ~~or elected official~~ who signed the written notification of contemplated disciplinary action shall attend and may also be represented by an attorney. The hearing may be continued, at the discretion of the ~~elected official~~executive employee, to allow the ~~elected official~~executive employee

to investigate or review the matter as a result of testimony or other evidence presented ~~to the elected official~~ at the hearing, or for other good reasons deemed appropriate by the executive employee. If additional grounds for discipline are discovered the employee shall receive additional notice pursuant to subsection B of this section and an additional chance to respond.

E. The ~~elected official~~executive employee shall issue a written decision no later than five (5) business days after the informal hearing has been concluded. An original of the decision shall be provided to the employee, and copies shall be delivered to the county personnel director and to the county prosecuting attorney. The written decision shall include a copy of this article.

F. When the contemplated disciplinary action is a dismissal or a suspension for thirty (30) days or more and the employee chooses to appeal the disciplinary action to his or her supervising elected official, ~~he or she shall be placed on administrative leave with pay until receipt of the written decision of the supervising elected official. If the employee appeals the decision of the supervising elected official to the Ada County personnel hearing officer,~~ he or she shall be placed on administrative leave without pay, pending further completion of the appeal process set forth therein.

When the contemplated disciplinary action is a suspension with pay and the employee chooses to appeal the suspension to his or her supervising elected official, the employee shall continue to receive his or her pay during the further completion of the appeal process. When the contemplated disciplinary action is a demotion, suspension for under thirty (30) days in duration, and/or an inband

reduction in pay and the employee chooses to appeal the disciplinary action to his or her supervising elected official, the employee shall not be placed on administrative leave, however, the demotion, suspension and/or reduction in pay shall be held in abeyance until receipt of the written decision of the supervising elected official, at which time the disciplinary action shall take effect, if applicable.

~~G. There is hereby created the position of Ada County personnel hearing officer. The individual chosen for this position will serve when needed, as cases arise under the appeal process described herein. The person selected as the Ada County personnel hearing officer shall be licensed to practice law in the state of Idaho, and shall have had experience in either the conduct of administrative hearings or the practice of local government law.~~

~~H. The Ada County personnel hearing officer shall be selected for a two (2) year appointment. At the conclusion of the two (2) year appointment, the hearing officer shall be reappointed or a replacement chosen by a majority vote of the selection committee.~~

~~I. The selection committee shall consist of all of the elected officials of Ada County, with the exception of the trial court administrator for the fourth judicial district court. Each elected official, excluding the trial court administrator for the fourth judicial district court, shall be entitled to vote in the selection process. The chairman of the board of Ada County commissioners shall act as chairman of the selection committee. He shall convene the first meeting of the selection committee within thirty (30) days from the date of adoption of this subsection. Additional meetings shall be conducted as the selection committee deems~~

~~appropriate, but the selection process shall be completed and the Ada County personnel hearing officer shall be appointed within ninety (90) days of the initial meeting.~~

~~J. Each member of the selection committee shall have the right to nominate at least one individual who possesses the minimum qualifications set forth in subsection G of this section. The selection committee shall choose the Ada County personnel hearing officer by majority vote of all members of the committee.~~

~~K. The Ada County personnel hearing officer shall preside over hearings to consider appeals of the employment actions brought under the provisions of this chapter. The hearing officer shall receive compensation for such duties, as determined by the selection committee.~~

~~L~~G. If the employee is dissatisfied with the written decision of the ~~elected official~~executive employee rendered pursuant to subsection E of this section, he or she may appeal to ~~the Ada County personnel hearing officer~~his or her elected official by filing ~~. A~~a notice of appeal ~~must be filed~~ with the county personnel director, the Ada County Prosecuting Attorney, and his or her elected official within ~~five~~ ten (~~5~~10) business days of ~~receipt, by~~mailing to the employee, ~~of~~ the written decision of the ~~elected official~~executive employee, as set forth above. The ~~Ada County personnel director shall promptly notify the Ada County personnel hearing officer~~supervising elected official ~~and the Ada County prosecuting attorney of the receipt of the appeal. The Ada County personnel hearing officer~~ shall conduct a formal hearing on such appeal, within fifteen (15) business days of receipt of the notice of appeal ~~by the county personnel director~~from the employee. If the employee is

represented by counsel, an entry of appearance must accompany the filing of the appeal.

~~Within forty eight (48) hours, excluding weekends, after an appeal is filed, the Ada County hearing officer will conduct a prehearing conference to address matters involving discovery. Each party must submit written requests for discovery to the hearing officer at the prehearing conference, and the hearing officer may hear any objections to discovery or motions for protective orders at that time. At the conclusion of the prehearing conference, the hearing officer will issue a written order establishing time frames for the completion of all discovery. In all circumstances, discovery must be completed five (5) calendar days prior to the formal hearing. The date set for the hearing may be continued only upon the written consent of all parties to the proceeding and the hearing officer. Appropriate sanctions may be imposed by the hearing officer for failing to abide by the discovery time frames established in the hearing officer's order; for example, at the hearing a party may be prevented from offering for substantive purposes evidence sought in their discovery requests.~~

Five (5) calendar days before the date set for the hearing before the ~~Ada County personnel hearing officer~~supervising elected official, a prehearing conference shall be held by the ~~personnel hearing officer~~supervising elected official to: define the issue(s), identify the evidence and witnesses to be adduced at the hearing, discuss existing or potential problems and possible resolutions, and determine the anticipated length of the hearing. ~~Each party~~The executive employee and the

employee shall each bring to the prehearing conference a concise statement ~~which~~ that sets forth the following:

1. ~~A concise statement of~~ The material facts supporting the parties' claims or defenses.

2. A ~~statement of~~ admitted or undisputed facts.

3. ~~A statement of i~~Issues of law supported by a memorandum of authorities.

4. A list of summaries or schedules referring to attached, itemized exhibits concerning any subject matter which involves accounting, computation, chronology or similar data reasonably calling for orderly itemization, e.g., wages, income, expenses, operations, tax computations, disability periods, a detailed itemization of claimed losses or injuries and that data and reasons upon which an expert bases his opinion (not the opinion itself), which clearly reflects the claims, defenses or evidence of the party, together with references to the records of other sources upon which such summaries or schedules are based.

5. The names, addresses and telephone numbers of all witnesses, except impeaching witnesses and the statement of each witness outlining their testimony.

6. Copies of any reports relevant to the proceedings.

~~6~~7. Any other appropriate comments, suggestions or information for the assistance of the ~~hearing officer~~supervising elected official in hearing the case

and reaching a decision thereon, or which the party intends to rely on or submit at the hearing.

No further discovery shall be allowed. Material facts, witnesses, exhibits and other contents of which disclosure is required in the prehearing statement and which are not disclosed in the statement are not admissible at the hearing by the party failing to disclose.

~~M~~H. The hearing before the ~~Ada County personnel hearing officer~~supervising elected official shall be conducted in the same general manner as a hearing pursuant to the administrative procedures act of the Idaho Code. No continuance of the hearing shall be granted except for good cause~~, and upon the written consent of both parties and the hearing officer~~. An electronic recording device shall preserve the testimony presented at such hearing and all documents received in evidence shall be preserved for possible future proceedings. The employee ~~and the elected official or executive employee~~ may be represented by counsel.

~~N~~I. Following the hearing before the ~~Ada County personnel hearing officer~~supervising elected official, a written decision shall be rendered within fifteen (15) business days after the hearing date. The written decision shall set forth specific findings of fact and conclusions of law, based upon the testimony and evidence presented at the hearing. The ~~Ada County personnel hearing officer~~supervising elected official has full authority to affirm, reverse or modify, wholly or in part, the previous employment action taken against the employee. The ~~hearing officer~~supervising elected official is invested with full authority to order that the employee be reinstated to his prior position and status,

with accrued pay and benefits, retroactive to the date of the employment action.

~~O. Either party shall have the right to appeal the decision of the Ada County personnel hearing officer to the district court of the fourth judicial district within sixty (60) days of the issuance of the written decision of the Ada County personnel hearing officer. (Ord. 383, 10-12-1999; amd. Ord. 386, 12-14-1999; amd. Ord. 390, 5-23-2000)~~

ADOPTED this _____ day of _____, 2006.

Board of Ada County Commissioners

By: _____
Rick Yzaguirre, Chairman

By: _____
Judy M. Peavey-Derr, Commissioner

By: _____
Fred Tilman, Commissioner

ATTEST:

_____
J. David Navarro, Ada County Clerk

PUBLISHED:_____

APPENDIX D – CONSTITUTION OF THE STATE OF STATE OF IDAHO, ARTICLE 18, § 6

§ 6. County officers. —

The legislature by general and uniform laws shall, commencing with the general election in 1986, provide for the election biennially, in each of the several counties of the state, of county commissioners and for the election of a sheriff, a county assessor, a county coroner and a county treasurer, who is ex-officio public administrator, every four years in each of the several counties of the state. All taxes shall be collected by the officer or officers designated by law. The clerk of the district court shall be ex-officio auditor and recorder. No other county offices shall be established, but the legislature by general and uniform laws shall provide for such township, precinct and municipal officers as public convenience may require, and shall prescribe their duties, and fix their terms of office. The legislature shall provide for the strict accountability of county, township, precinct and municipal officers for all fees which may be collected by them, and for all public and municipal moneys which may be paid to them, or officially come into their possession. The county commissioners may employ counsel when necessary. The sheriff, county assessor, county treasurer, and ex-officio tax collector, auditor and recorder and clerk of the district court shall be empowered by the county commissioners to appoint such deputies and clerical assistants as the business of their office may require, said deputies and clerical assistants to receive such compensation as may be fixed by the county commissioners. (Emphasis added).

APPENDIX E – STATUTES OF THE STATE OF IDAHO, TITLE 31 (COUNTIES AND COUNTY LAW), CHAPTER 7 (BOARD OF COUNTY COMMISSIONERS), § 31-714 (ORDINANCE – PENALTIES)

31-714. Ordinances — penalties.

The board of county commissioners may pass all ordinances and rules and make all regulations, not repugnant to law, necessary for carrying into effect or discharging the powers and duties conferred by the laws of the state of Idaho, and such as are necessary or proper to provide for the safety, promote the health and prosperity, improve the morals, peace and good order, comfort and convenience of the county and the inhabitants thereof, and for the protection of property therein, and may enforce obedience to such ordinances with such fines or penalties, including infraction penalties, as the board may deem proper; provided, that the punishment of any offense shall be by fine of not more than one thousand dollars ($1,000) or by imprisonment not to exceed six (6) months, or by both such fine and imprisonment.

[1965, ch. 159, § 1, p. 308; am. 1976, ch. 145, § 1, p. 530; am. 1978, ch. 260, § 1, p. 566; am. 2000, ch. 35, § 1, p. 63; am. 2005, ch. 359, § 14, p. 1133.]

APPENDIX F – STATUTES OF THE STATE OF IDAHO, TITLE 67 (STATE GOVERNMENT AND STATE AFFAIRS), CHAPTER 23 (MISCELLANEOUS PROVISIONS), § 67-2345 (EXECUTIVE SESSIONS – WHEN AUTHORIZED)

67-2345. Executive sessions — When authorized. —

(1) Nothing contained in this act shall be construed to prevent, upon a two-thirds (2/3) vote recorded in the minutes of the meeting by individual vote, a governing body of a public agency from holding an executive session during any meeting, after the presiding officer has identified the authorization under this act for the holding of such executive session. An executive session may be held:

(a) To consider hiring a public officer, employee, staff member or
individual agent. This paragraph does not apply to filling a vacancy in an elective office;

(b) To consider the evaluation, dismissal or disciplining of, or to hear complaints or charges brought against, a public officer, employee, staff member or individual agent, or public school student;

(c) To conduct deliberations concerning labor negotiations or to acquire an interest in real property which is not owned by a public agency;

(d) To consider records that are exempt from disclosure as provided in chapter 3, title 9, Idaho Code;

(e) To consider preliminary negotiations involving matters of trade or commerce in which the governing body is in competition with governing bodies in other states or nations;

(f) To consider and advise its legal representatives in pending litigation or where there is a general public awareness of probable litigation;

(g) By the commission of pardons and parole, as provided by law;

(h) By the sexual offender classification board, as provided by chapter 83, title 18, Idaho Code;

(i) By the custody review board of the Idaho department of juvenile corrections, as provided by law.

(2) Labor negotiations may be conducted in executive session if either side requests closed meetings. Notwithstanding the provisions of section 67-2343, Idaho Code, subsequent sessions of the negotiations may continue without further public notice.

(3) No executive session may be held for the purpose of taking any final action or making any final decision.

[1974, ch. 187, § 6, p. 1492; am. 1976, ch. 124, § 1, p. 473; am. 1977, ch. 173, § 3, p. 445; am. 1978, ch. 302, § 1, p. 759; am. 1986, ch. 59, § 2, p. 167; am. 1990, ch. 213, § 92, p. 480; am. 1998, ch. 411, § 5, p. 1275; am. 2003, ch. 164, § 3, p. 462.]

(Emphasis added).

APPENDIX G – STATUTES OF THE STATE OF IDAHO, TITLE 32 (COUNTIES AND COUNTY LAW), CHAPTER 26 (PROSECUTING ATTORNEY), § 31-2603 (SPECIAL PROSECUTOR – APPOINTMENT)

***31-2603.* Special prosecutor — Appointment.**

(a) When the prosecuting attorney for the county is absent from the court, or when he has acted as counsel or attorney for a party accused in relation to the matter of which the accused stands charged, and for which he is to be tried on a criminal charge, or when he is near of kin to the party to be tried on a criminal charge, or when he has a business connection or kinship with the complainant or defendant, or when he is unable to attend to his duties, the district court may, upon petition of the prosecuting attorney or board of county commissioners, by an order entered in its minutes, stating the cause therefor, appoint some suitable person to perform for the time being, or for the trial of such accused person, the duties of such prosecuting attorney, and the person so appointed has all the powers of the prosecuting attorney, while so acting as such.

(b) The prosecuting attorney may petition the district judge of his county for the appointment of a special assistant attorney-general to assist in the prosecution of any criminal case pending in the county; and if it appears to the district judge to whom such petition is addressed that good cause appears for granting such petition, the district judge, may, with the approval of the attorney-general, appoint an assistant attorney-general to assist in such prosecution. The compensation of the person so appointed shall be fixed by agreement between the district judge and the attorney-general and shall be paid by the attorney-general out of appropriations made available for the conduct of his office.

Appendix G

[1897, p. 74, § 2; reen. 1899, p. 24, § 2; am. and reen. R.C. & C.L., § 2081; C.S., § 3654; I.C.A., § 30-2103; am. 1953, ch. 239, § 2, p. 360; am. 1988, ch. 295, § 1, p. 935.]

APPENDIX H –IDAHO RULES OF CIVIL PROCEDURE (I.R.C.P.), RULE 84 (a)

Rule 84(a). Judicial review of state agency and local government actions.

(1) Scope of Rule 84. The procedures and standard of review applicable to judicial review of state agency and local government actions shall be as provided by statute. When judicial review of an action of a state agency or local government is expressly provided by statute. When judicial review of an action of a state agency or local government is expressly provided by statute but no stated procedure or standard of review is provided in that statute, then Rule 84 provides the procedure for the district Court's judicial review. Actions of state agencies or officers or actions of a local government, its officers or its units are not subject to judicial review unless expressly authorized by statute. Rule 84 does not apply to the issuance of writs of mandate, prohibition, quo warranto, certiorari, review, or other common law or equitable writs, but petitions for judicial review under this rule may be filed with or in the alternative to petitions for these common law or equitable writs.

(2) Definitions. The terms "action," "agency," "judicial review," "petitioner" and "respondent" have the following meaning in Rule 84:

(A) "Action" means any rule, order, ordinance or other decision or lack of decision of an agency made reviewable by statute.

(B) "Agency" means any board, commission, department, or officer for which statute provides for the district court's judicial review of the agency's action.

Appendix H

(C) "Judicial review" means the district court's review pursuant to statute of actions of agencies, whether the statutory term for review is appeal or judicial review or some other term, and the term judicial review includes other terms like appeal.

(D) "Petitioner" means the person seeking judicial review and includes other terms like appellant.

(E) "Respondent" means any person responding to the petitioner's request for judicial review of the agency's action before the district court, including the agency itself.

(Adopted April 19, 1995, effective July 1, 1995; amended March 31, 1998, effective July 1, 1998, July 1, 2000, amended, effective July 1, 2002.)

Supreme Court, U.S.
FILED
06-233 AUG 11 2006
OFFICE OF THE CLERK

(4)

No. 06-

IN THE

Supreme Court of the United States

STACY A. GIBSON,

Petitioner,

v.

ADA COUNTY, *et al*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IDAHO

PETITION FOR WRIT OF CERTIORARI

APPENDIX – VOLUME III

APPENDICES 58 – 79

Vernon K. Smith
1900 W. Main Street
Boise, Idaho 83702
(208) 345-1125
Attorney for Petitioner

TABLE OF APPENDICES – VOLUME III

Page

APPENDIX 58 – Memorandum Decision and Order (Document No. 65), Entered June 12, 2006 By Chief Judge, B. Lynn Winmill, In The Matter Of *Knickerbocker, et al. v. Ada County, Idaho*, Case No. CV 04-288-S-BLW, U.S. District Court, District Of Idaho..... 420a

APPENDIX 59 – Affidavit Of Plaintiff's Counsel, Daniel E. Williams (Document No. 21-1), Filed February 11, 2005 In *Knickerbocker, et al. v. Ada County, Idaho*, Case No. CV 04-288-S-BLW, U.S. District Court, District Of Idaho, Attesting To The Validity Of Documents Attached Thereto..... 424a

APPENDIX 60 – Excerpt Taken From Ada County's Response To Interrogatory No. 3 (Document No. 21-5, p. 2), Verified By Gary Raney, Newly Elected Ada County Sheriff, Filed February 11, 2005 In *Knickerbocker, et al. v. Ada County, Idaho*, CV 04-288-S-BLW..... 427a

APPENDIX 61 – Excerpt Taken From Ada County's Response To Interrogatory No. 9 (Document No. 21-5, p. 4-5), Verified By Gary Raney, Newly Elected Ada County Sheriff, Filed February 11, 2005 In *Knickerbocker, et al. v. Ada County, Idaho*, CV 04-288-S-BLW..... 428a

APPENDIX 62 – Excerpt Taken From Ada County's Response To Interrogatory No. 10 (Document No. 21-5, p. 5), Verified By Gary Raney, Newly Elected Ada County Sheriff, Filed February 11, 2005 In *Knickerbocker, et al. v. Ada County, Idaho*, CV 04-288-S-BLW..... 430a

Table Of Appendices

Page

APPENDIX 63 – Excerpt Taken From Ada County's Response To Interrogatory No. 12 (Document No. 21-5, p. 6), Verified By Gary Raney, Newly Elected Ada County Sheriff, Filed February 11, 2005 In *Knickerbocker, et al. v. Ada County, Idaho*, CV 04-288-S-BLW..... 431a

APPENDIX 64 – Excerpt Taken From Ada County's Response To Interrogatory No. 13 (Document No. 21-5, p. 6-7), Verified By Gary Raney, Newly Elected Ada County Sheriff, Filed February 11, 2005 In *Knickerbocker, et al. v. Ada County, Idaho*, CV 04-288-S-BLW..... 432a

APPENDIX 65 – Ada County's Supplemental Affidavit Of Kelli Bolicek, Filed In Support Of Motion For Summary Judgment, December 2, 2004, In The Matter Of *Ada County v. Stacy A. Gibson*, CV OC 0107394D..... 433a

APPENDIX 66 – Ada County's Affidavit Of Cheryl Bower, Filed In Support Of Motion For Summary Judgment, December 2, 2004, In The Matter Of *Ada County v. Stacy A. Gibson*, CV OC 0107394D..... 438a

APPENDIX 67 – [Gibson] Memorandum Submitted In Opposition To Ada County's Motion For Summary Judgment, November 1, 2004, In The Matter Of *Ada County v. Stacy A. Gibson*, CV OC 0107394D..... 442a

APPENDIX 68 – Ada County's Affidavit Of Kelli

Table Of Appendices

Page

Bolicek, Filed In Support Of Motion For Summary Judgment, September 29, 2004, In The Matter Of *Ada County v. Stacy A. Gibson*, CV OC 0107394D..... 455a

APPENDIX 69 – Letter From Ada County Under-Sheriff, Gary Raney (Later Elected Sheriff), To Dawn K. McKinney, Dated June 1, 2004, Advising Reasons She Was Sent Compensation Due To County's Misuse of "7K" Exemption..... 459a

APPENDIX 70 – The FLSA "Release" Or "Waiver" Enclosed With Letter (Appendix 69) Undersheriff, Gary Raney, Sent To Dawn K. McKinney, Dated June 1, 2004..... 462a

APPENDIX 71 – Letter From Gibson's Counsel To Then Ada County Sheriff, Vaughn Killeen, Dated June 1, 2004 (Stemming From Discovery Of Appendix 69), Requesting The County Disburse Funds To Gibson Because Of The Misuse Of The "7K" Exemption Which Caused Under Compensation To Her As A Jail Technician..... 463a

APPENDIX 72 – Letter From Gibson's Counsel To Ada County Attorney, Ray J. Chacko, Dated June 18, 2004, Advising Awareness Ada County Under Compensated Jail Technicians Because Of The Violation Of The "7K" Exemption, Knowledge Of The County's Recent Efforts To Disburse Funds To Jail Technicians For Under Compensated Overtime, And Demand Ada County Disburse Funds To Gibson In A Non-Discriminatory Manner,

Table Of Appendices

	Page
Pursuant To FLSA.....	465a
APPENDIX 73 – [Gibson] Verified Second Amended Counterclaim, Filed February 2, 2004, In The Matter of *Ada County v. Stacy A. Gibson*, CV OC 0107394D.....	474a
APPENDIX 74 – Excerpt Of Kelli Bolicek's Testimony Taken During Gibson's Personnel Hearing On January 26, 2000.....	534a
APPENDIX 75 – Excerpt of Marshia Eiguren's Testimony Taken During Gibson's Personnel Hearing On January 26, 2000.....	542a
APPENDIX 76 – Ada County Sheriff's Office Policy Manual, § 7.05 (2) (Members' Rights), Effective October 1, 1998, Approved By Ada County Sheriff, Vaughn Killeen.....	548a
APPENDIX 77 – Ada County Sheriff's Office Policy Manual, § 7.05 (4) (Members' Rights), Effective October 1, 1998, Approved By Ada County Sheriff, Vaughn Killeen.....	549a
APPENDIX 78 – Ada County Sheriff's Office Policy Manual, § 7.05 (7) (Members' Rights), Effective October 1, 1998, Approved By Ada County Sheriff, Vaughn Killeen.....	550a
APPENDIX 79 – Ada County Automatic Paycheck Deposit Authorization, Dated August 6, 1998 And Signed By Gibson.....	551a

APPENDIX 58 – MEMORANDUM DECISION AND ORDER (DOCUMENT NO. 65), ENTERED JUNE 12, 2006 BY CHIEF JUDGE, B. LYNN WINMILL, IN THE MATTER OF *KNICKERBOCKER, ET AL. V. ADA COUNTY, IDAHO*, CASE NO. CV O4-288-S-BLW, US. DISTRICT COURT, DISTRICT OF IDAHO

IN THE UNITED STATES DISTRICT COURT FOR THE STATE OF IDAHO

Case No. CV 04-288-S-BLW

MEMORANDUM DECISION AND ORDER

Filed: June 12, 2006

Document No. 65

DAWN C. KNICKERBOCKER, VIRGINIA L. ATCHLEY, and TAMMY L. BATCH, individually and on behalf of those similarly situated,

Plaintiff,

vs.

ADA COUNTY, IDAHO,

Defendant.

Appendix 58

INTRODUCTION

The Court has before it plaintiffs' motion for final certification. The Court heard oral argument on May 26, 2006, and took the motion under advisement. For the reasons expressed below, the Court will grant final certification of a collective action under the Fair Labor Standards Act (FLSA) but deny the request for a class action under Rule 23 for the state law claims.

ANALYSIS

In an earlier decision, the Court conditionally certified this case as a collective action under the FLSA. Plaintiffs sent out notices and 16 prospective plaintiffs opted into the suit. Plaintiffs now seek final certification.

Plaintiffs seek to certify a class of Jail Technicians employed by Defendant at the Ada County Sheriff's Office at any time between June 8, 2001, and June 8, 2004, and classified by the defendant as exempt under § 7(K) of the FLSA.

Section 216(b) of the FLSA requires plaintiffs to show that prospective plaintiffs are "similarly situated." For plaintiffs to be similarly situated, there must be a factual nexus that binds them together as victims of an alleged policy or practice. *Ballaris v. Wacker Silttronic Corp.*, 2001 WL 1335809 (D.Or. August 24, 2001). In addition, the Court may consider whether the various defenses available to the defendant may be individual to each plaintiff, making it difficult for defendant to present a full range of defenses. *Pfohl v. Farmers Ins. Group*, 2004 WL 554834 at *2 (C.D.Cal. 2004). Finally, the Court should consider fairness and procedural factors. *Id.*

Here, the factual nexus is that prior to April of 2004, the defendant treated the class of Jail Technicians as exempt under § 7(k) of the FLSA. The defendant Ada County may have individualized defenses but the size of the group is not so large that presentation of these defenses would be prejudiced in any way. Finally, the fairness factor weighs in plaintiffs' favor given the basic similarity of their claims and the greater efficiency of resolving them in a single action rather than in individually-filed actions. For these reasons, the Court will certify this action as a collective action under the FLSA.

The Court turns next to whether the plaintiffs are entitled to Rule 23 class certification for their state law claims. The Court rejects this claim because plaintiffs have not demonstrated to the Court how a Rule 23 class for the state law claims would provide relief that is not already provided by the FLSA collective action.

Ada County requests the Court to go further and dismiss the state law claims. However, there is no motion to dismiss before the Court, and until the matter is properly presented, the Court will not rule.

ORDER

In accordance with the Memorandum Decision set forth above,

NOW THEREFORE IT IS HEREBY ORDERED, that the motion to certify class for final certification under 29 U.S.C. § 216(b) (Docket No. 48) is GRANTED IN PART AND DENIED IN PART. It is granted to the extent it seeks final certification under the FLSA, 29 U.S.C. § 216(b), for a collective action including as plaintiffs Jail Technicians

employed by defendant at the Ada County Sheriff's Office at any time between June 8, 2001, and June 8, 2004, and classified by the defendant as exempt under § 7(K) of the FLSA. It is denied in all other respects, specifically with respect to the request for a Rule 23 class certification of state law claims.

DATED: June 12, 2006

s/ B. Lynn Winmill
B. LYNN WINMILL
Chief Judge
United States District Court

APPENDIX 59 – AFFIDAVIT OF PLAINTIFF'S COUNSEL, DANIEL E. WILLIAMS (DOCUMENT NO. 21-1), FILED FEBRUARY 11, 2005, IN *KNICKERBOCKER, ET AL. V. ADA COUNTY, IDAHO*, CASE NO. CV O4-288-S-BLW, US. DISTRICT COURT, DISTRICT OF IDAHO, ATTESTING TO THE VALIDITY OF THE DOCUMENTS ATTACHED THERETO

IN THE UNITED STATES DISTRICT COURT FOR THE STATE OF IDAHO

Case No. CV 04-288-S-BLW

AFFIDAVIT OF DANIEL E. WILLIAMS

Filed: February 11, 2005

Document No. 21-1

DAWN C. KNICKERBOCKER, VIRGINIA L. ATCHLEY, and TAMMY L. BATCH, individually and on behalf of those similarly situated,

Plaintiff,

vs.

ADA COUNTY, IDAHO,

Defendant.

Appendix 59

STATE OF IDAHO)
)ss.
County of Ada)

DANIEL E. WILLIAMS deposes and says as follows:

1. I am one of the counsel of record for Plaintiffs in this matter and have personal knowledge of the facts and matters set forth herein.

2. Attached hereto as the designated exhibits are true and correct copies of the following documents:

"A" Rule 30(b)(6) Deposition of Ada County, Testimony Of Randy Folwell of February 3, 2005;

"B" Defendant's Answers and Responses to Plaintiff's First Set of Interrogatories and Requests for Production of Documents to Defendant

"C" Defendant's Responses to Plaintiff's First Set of Requests for Admission.

3. Pursuant to Rule 23(a) and Rule 23(g), I submit that William H. Thomas and I, along with other attorneys and staff at Huntley Park, LLP, are competent to prosecute this action of behalf of the prospective class. Specifically, we have performed the work necessary in identifying and investigating potential claims in this action, as set forth in Plaintiff's Second Amended Complaint.

Appendix 59

4. Our firm generally and William H. Thomas and I individually are experienced in handling class actions and complex litigation and we are knowledgeable regarding applicable law. Mr. Thomas and I have competently handled several class action cases, including but not limited to the following federal cases in the District of Idaho: Bristwo, et al., v. Fleetwood Enterprises, Inc., Case No. 00-0082; Bogan, et al., v. Fleetwood, Enterprises, Inc., Case No. 00-0440; Munoz, et al., v. Fleetwood Enterprises, In., Case No. 02-224; Moon, et al., v. Quest Communications International, Inc., Smith v. Micron Electronics, Inc., Case No., 02-579, as well as other complex litigation.

5. Counsel will commit the necessary resources to represent the class.

6. Counsel do not have conflicts of interest with class members nor does there exist any other reason why counsel should not serve as class counsel.

7. Defendant's counsel has indicated that, if a three-year period was used to compensate Jail Technicians, an additional thirty-one (31) more class members would be eligible for compensation.

S/ Daniel E. Williams

Subscribed and sworn to before me this 11th day of February, 2005.

S/ Glenys McPherson
Notary Public for Idaho
Residing at Boise, Idaho
My Commission Expires: 11/7/06

APPENDIX 60 – EXCERPT TAKEN FROM ADA COUNTY'S RESPONSE TO INTERROGATORY NO. 3 (DOCUMENT NO. 21-5, P. 2), VERIFIED BY GARY RANEY, NEWLY ELECTED SHERIFF, FILED FEBRUARY 11, 2005 IN *KNICKERBOCKER, ET AL. V. ADA COUNTY, IDAHO*, CV 04-288-S-BLW

INTERROGATORY NO. 3: Please identify when the Ada County Sheriff's Office or any one acting on behalf of the Ada County Sheriff's Office first classified the position of jail technician as exempt under 29 U.S.C. § 207(k).

ANSWER: Objection. Defendant objects to this interrogatory on grounds that it seeks information protected by the attorney-client and attorney work product privileges. Notwithstanding the objection and without waiving the objection, Defendant believes that jail technicians were classified as exempt under 29 U.S.C. § 207(k) sometime between 1993 to 1995.

APPENDIX 61 – EXCERPT TAKEN FROM ADA COUNTY'S RESPONSE TO INTERROGATORY NO. 9 (DOCUMENT NO. 21-5, P. 4-5), VERIFIED BY GARY RANEY, NEWLY ELECTED SHERIFF, FILED FEBRUARY 11, 2005 IN *KNICKERBOCKER, ET AL. V. ADA COUNTY, IDAHO*, CV 04-288-S-BLW

INTERROGATORY NO. 9: Please identify all persons who participated in any way in the decision "to compensate these law enforcement personnel as if they had worked on a forty (40) hour per week schedule."

ANSWER: Objection. Defendant objects to this interrogatory on grounds that it seeks information protected by the attorney-client and attorney work product privileges. Defendant also objects to this interrogatory on the ground that it seeks irrelevant, immaterial information, and is overly vague, ambiguous and broadly written. Lacking the necessary specificity required for Plaintiff [Defendant] to be able to identify the information sought and is not otherwise reasonably calculated to lead to the discovery of admissible evidence. Notwithstanding the objection and without waiving the objection, Defendant answers with the following:

a. Gary Raney, 7200 Barrister Drive, Boise, Idaho, 83704 (208) 377-6500.

b. Kelli Bolicek, 7200 Barrister Drive, Boise, Idaho, 83704 (208) 377-6500.

c. Andrea Patterson, 7200 Barrister Drive, Boise, Idaho, 83704 (208) 377-6500.

Appendix 61

d. Mike Laky, 7200 Barrister Drive, Boise, Idaho, 83704 (208) 377-6500.

e. Roy Holloway, 7200 Barrister Drive, Boise, Idaho, 83704 (208) 377-6500.

f. Randy Folwell, 7200 Barrister Drive, Boise, Idaho, 83704 (208) 377-6500.

g. Vaughn Killeen, 7200 Barrister Drive, Boise, Idaho, 83704 (208) 377-6500.

h. Judy Peavey-Derr, 200 West Front Street, Room 3255, Boise, Idaho, 83702 (208) 287-7000.

i. Fred Tillman, 200 West Front Street, Room 3255, Boise, Idaho, 83702 (208) 287-7000.

j. Rick Yzaguirre, 200 West Front Street, Room 3255, Boise, Idaho, 83702 (208) 287-7000.

k. J. David Navarro, 200 West Front Street, Room 1193, Boise, Idaho, 83702 (208) 287-6887.

l. Derek Voss, 200 West Front Street, Room 3269, Boise, Idaho, 83702 (208) 287-7130.

Defendant reserves the right to supplement this list as warranted by further investigation and/or as discovery may require.

APPENDIX 62 – EXCERPT TAKEN FROM ADA COUNTY'S RESPONSE TO INTERROGATORY NO. 10 (DOCUMENT NO. 21-5, P. 5), VERIFIED BY GARY RANEY, NEWLY ELECTED SHERIFF, FILED FEBRUARY 11, 2005 IN *KNICKERBOCKER, ET AL. V. ADA COUNTY, IDAHO*, CV 04-288-S-BLW

INTERROGATORY NO. 10: Please identify all persons who participated in any way in recalculating the wages due to jail technicians while they worked as 7K exempt between June 1, 2002 and June 1, 2004.

ANSWER: Objection. See Answer to Interrogatory No. 9.

APPENDIX 63 – EXCERPT TAKEN FROM ADA COUNTY'S RESPONSE TO INTERROGATORY NO. 12 (DOCUMENT NO. 21-5, P. 6), VERIFIED BY GARY RANEY, NEWLY ELECTED SHERIFF, FILED FEBRUARY 11, 2005 IN *KNICKERBOCKER, ET AL. V. ADA COUNTY, IDAHO*, CV 04-288-S-BLW

INTERROGATORY NO. 12: Please state the total amount of compensation paid to all jail technicians on or about June 1, 2004, for re-calculation of wages due between June 1, 2002 and June 1, 2004.

ANSWER: Defendant objects to this interrogatory on the ground that it seeks irrelevant, immaterial information, and is not otherwise reasonably calculated to lead to the discovery of admissible evidence. Notwithstanding the objection and without waiving the objection, Defendant answers that approximately $52,593.17 was given as additional compensation to jail technicians on or about June 1, 2004.

APPENDIX 64 – EXCERPT TAKEN FROM ADA COUNTY'S RESPONSE TO INTERROGATORY NO. 13 (DOCUMENT NO. 21-5, P. 6-7), VERIFIED BY GARY RANEY, NEWLY ELECTED SHERIFF, FILED FEBRUARY 11, 2005 IN *KNICKERBOCKER, ET AL. V. ADA COUNTY, IDAHO*, CV 04-288-S-BLW

INTERROGATORY NO. 13: Please state the total number of jail technicians who were paid on or about June 1, 2004, for a re-calculation of wages due between June 1, 2002 and June 1, 2004.

ANSWER: Defendant objects to this interrogatory on the ground that it seeks irrelevant, immaterial information, and is not otherwise reasonably calculated to lead to the discovery of admissible evidence. Notwithstanding the objection and without waiving the objection, Defendant answers that approximately 64 jail technicians were given additional compensation on or about June 1, 2002.

APPENDIX 65 – ADA COUNTY'S SUPPLEMENTAL AFFIDAVIT OF KELLI BOLICEK, FILED IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT, DECEMBER 2, 2004, IN THE MATTER OF *ADA COUNTY V. STACY A. GIBSON*, CV OC 0107394D

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

Case No. CV OC 0107394D

SUPPLEMENTAL AFFIDAVIT OF KELLI BOLICEK IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Filed: December 2, 2004

ADA COUNTY,

Plaintiff/Counterdefendant,

v.

STACY A. GIBSON,

Defendant/Counterclaimant.

STATE OF IDAHO)
) ss.
County of Ada)

Appendix 65

KELLI BOLICEK, being first duly sworn upon oath, deposes and says:

1. That as of October 31, 2004, my title has changed from Finance Manager to Finance Director at the Ada County Sheriff's Office and I have worked at the Ada County Sheriff's Office since 1996.

2. That I am personally familiar with this case.

3. That as the Finance Director (and as the past Finance Manager), my responsibilities include oversight of all facets of the Ada County Sheriff's Office finances including overtime calculation, salaries, and payroll records of employees of the Ada County Sheriff's Office.

4. That from October 16, 1998, through July 20, 1999, each of Stacy Gibson's regularly scheduled shifts consisted of 12.2 hours each, representing 12 hours during the shift plus 12 minutes to compensate her for the jail briefing before each shift. Stacy Gibson was compensated for the additional 12 minutes added to each shift.

5. That attached hereto as Exhibit A is a true and correct copy of a letter dated August 11, 1999, from me to Monte MacConnell, which sets forth the accounting used to determine that Stacy Gibson was mistakenly overpaid $8,528.89. Said letter includes an attached spreadsheet from Cheryl Bower that shows Stacy Gibson was overpaid a gross wage of $12,003.89. After subtracting out Federal Taxes of $1,688.75, State Taxes of $867.95, and FICA of $918.30 that were mistakenly paid on her behalf, the net amount remaining was $8,528.89. The same calculation can be arrived at by taking the $7,783.38 net pay amount shown on the spreadsheet and adding back in $703.44

Appendix 65

paid into Stacy Gibson's PERSI account plus $42.07 paid into her Deferred Compensation Account, which again equals $8,528.89.

DATED this 2nd day of December, 2004.

S/ Kelli R. Bolicek
Kelli Bolicek

STATE OF IDAHO)
) ss.
County of Ada)

SUBSCRIBED AND SWORN to before me this 2nd day of December, 2004

s/ Betty Gjesdal
Notary Public for Idaho
Commission Expires *12/20/2008*

Appendix 65 – Exhibit A

MEMORANDUM

DATE: August 11, 1999

TO: Monte MacConnell

FROM: Kelli Bolicek

SUBJECT: Amount due from Stacey Gibson

Please see the attached spreadsheet showing the amounts given to Stacey over the 8-month period in question versus the amounts that should have been paid to her. The total amount due from Stacey is $8,528.89 as shown below:

Gross Wage Difference	$12,003.89
Federal Tax Difference	-$ 1,688.75
State Tax Difference	-$ 867.95
FICA Difference	-$ 918.30
Net Due	$ 8,528.89

At this time, Stacey's W-2 will come out showing the full amount received in wages. When we receive payment, the Payroll Department can adjust her "Gross" wages down to the actual amount, which will adjust her withholding taxes. PERSI will work directly with her to adjust the amount paid into her retirement. The deferred compensation piece is in the gross figure to calculate taxes. Then, that amount is backed out to come to her next check. All other benefits were taken as they should have been.

If you have any questions regarding these figures, please give me a call.

s/ Kelli R. Bolicek
Kelli R. Bolicek
Budget Director, Ada County Sheriff's Office

BEST AVAILABLE COPY

Appendix 65 – Exhibit

PAID	GROSS WAGE	FEDERAL	STATE	FICA	PERSI	DEF COMP	DENTAL	HEALTH	DEP LIFE	RET. LIFE	NET PAY
NOVEMBER	$3,226.71	$313.89	$151.83	$236.79	$169.09	$50.00	$21.35	$110.00	$0.45	$12.00	$2,141.21
DECEMBER	$3,391.82	$332.21	$161.30	$246.82	$198.75	$50.00	$55.15	$110.00	$0.45	$12.00	$2,224.94
JANUARY	$3,602.70	$361.39	$172.21	$262.97	$211.12	$50.00	$55.15	$110.00	$0.45	$12.00	$2,367.41
FEBRUARY	$3,075.00	$286.87	$133.46	$222.60	$180.20	$50.00	$55.15	$110.00	$0.45	$12.00	$2,024.27
MARCH	$3,075.00	$286.87	$133.46	$222.60	$180.20	$50.00	$55.15	$110.00	$0.45	$12.00	$2,024.27
APRIL	$3,549.93	$353.94	$168.33	$258.94	$208.03	$50.00	$55.15	$110.00	$0.45	$12.00	$2,333.09
MAY	$3,761.01	$383.74	$183.83	$275.08	$220.40	$50.00	$55.15	$110.00	$0.45	$12.00	$2,470.36
JUNE	$3,233.31	$309.23	$145.08	$234.72	$189.47	$50.00	$55.15	$110.00	$0.45	$12.00	$2,127.21
TOTAL	$26,915.28	$2,628.24	$1,249.50	$1,960.52	$1,577.26	$400.00	$407.40	$880.00	$3.60	$96.00	$17,712.76
SHOULD BE											
NOVEMBER	$1,721.26	$102.60	$42.86	$121.82	$100.87	$42.04	$21.35	$110.00	$0.45	$12.00	$1,167.47
DECEMBER	$1,890.55	$121.19	$52.15	$131.99	$110.79	$43.71	$55.15	$110.00	$0.45	$12.00	$1,253.12
JANUARY	$2,107.26	$150.84	$62.87	$148.57	$123.49	$45.88	$55.15	$110.00	$0.45	$12.00	$1,398.03
FEBRUARY	$1,665.50	$75.14	$26.75	$107.13	$91.74	$40.50	$55.15	$110.00	$0.45	$12.00	$1,046.64
MARCH	$1,565.50	$75.14	$26.75	$107.13	$91.74	$40.50	$55.15	$110.00	$0.45	$12.00	$1,046.64
APRIL	$2,053.08	$143.27	$59.09	$144.42	$120.31	$45.32	$55.15	$110.00	$0.45	$12.00	$1,383.07
MAY	$2,272.32	$173.53	$74.52	$161.19	$133.16	$50.00	$55.15	$110.00	$0.45	$12.00	$1,502.32
JUNE	$1,735.92	$97.78	$36.56	$120.17	$101.72	$50.00	$55.15	$110.00	$0.45	$12.00	$1,152.09
TOTAL	$14,011.39	$939.49	$381.55	$1,042.22	$873.82	$357.93	$407.40	$880.00	$3.60	$96.00	$9,929.38
DIFFERENCE	$12,003.89	$1,688.75	$867.95	$918.30	$703.44	$42.07	$0.00	$0.00	$0.00	$0.00	$7,783.38

Aug 11 '99 9:24 P.0
RDS COUNTY AUDITOR Fax:3642230

EXHIBIT

Post-it Fax Note 7671 | Date 8-12-99 | # of pages 1
To Bobbie | From Wendy
Co./Dept. Sheriff | Co. Auditor
Phone # 670100 | Phone # 2208
Fax # 377-6535 | Fax #

APPENDIX 66 – ADA COUNTY'S AFFIDAVIT OF CHERYL BOWER, FILED IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT, DECEMBER 2, 2004, IN THE MATTER OF *ADA COUNTY V. STACY A. GIBSON*, CV OC 0107394D

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

Case No. CV OC 0107394D

AFFIDAVIT OF CHERYL BOWER
IN SUPPORT OF MOTION
FOR SUMMARY JUDGMENT

Filed: December 2, 2004

ADA COUNTY,

Plaintiff/Counterdefendant,

v.

STACY A. GIBSON,

Defendant/Counterclaimant.

STATE OF IDAHO)
) ss.
County of Ada)

Appendix 66

CHERYL BOWER, being first duly sworn upon oath, deposes and says:

1. That I am the Controller at the Ada County Clerk/Auditor/Recorder's Office and have worked at the Ada County Clerk/Auditor/Recorder's Office since 1990.

2. That I am personally familiar with this case.

3. That as the Controller, my responsibilities include planning, organizing, implementing and coordinating, the central accounting system, sub-systems, and other financial controls and directing accounting, budgeting, and financial management activities for Ada County.

4. That as the Controller, I have worked with Kelli Bolicek at the Ada County Sheriff's Office to reconcile Stacy Gibson's payroll records.

5. That attached hereto as Exhibit A is a true and correct copy of a spreadsheet I sent to Kelli Bolicek which shows Stacy Gibson was overpaid a gross wage of $12,003.89. After subtracting out Federal Taxes of $1,688.75, State Taxes of $867.95, and FICA of $918.30 that were mistakenly paid on her behalf, the net amount remaining was $8,528.89. The same calculation can be arrived at by taking the $7,783.38 net pay amount shown on the spreadsheet and adding back in $703.44 paid into Stacy Gibson's PERSI account plus $42.07 paid into her Deferred Compensation Account, which again equals $8,528.89.

6. That my own handwritten note on Exhibit A states that Stacy Gibson owes Ada County $8,528.89.

Appendix 66

DATED this 2 day of December, 2004.

s/ Cheryl Bower

STATE OF IDAHO)
) ss.
County of Ada

SUBSCRIBED AND SWORN to before me this 2 day of December, 2004.

s/ Shari Strong
Notary Public for Idaho
Commission Expires *2/4/06*

Appendix 66 – Exhibit A

EXHIBIT A

	GROSS WAGE	FEDERAL	STATE	FICA	PERS!	DEF COMP	DENTAL	HEALTH	DEP LIFE	RET. LIFE	NET PAY
PAID											
NOVEMBER	$3,226.71	$313.89	$151.83	$238.79	$189.00	$50.00	$21.35	$110.00	$0.45	$12.00	$2,141.21
DECEMBER	$3,361.62	$332.21	$161.30	$248.82	$196.75	$50.00	$55.15	$110.00	$0.45	$12.00	$2,224.94
JANUARY	$3,002.70	$301.39	$172.21	$262.97	$211.12	$50.00	$55.15	$110.00	$0.45	$12.00	$2,367.41
FEBRUARY	$3,078.00	$288.87	$133.48	$222.80	$180.20	$50.00	$55.15	$110.00	$0.45	$12.00	$2,024.27
MARCH	$3,078.00	$288.87	$133.48	$222.80	$180.20	$50.00	$55.15	$110.00	$0.45	$12.00	$2,024.27
APRIL	$3,078.00	$288.87	$133.48	$222.80	$180.20	$50.00	$55.15	$110.00	$0.45	$12.00	$2,333.09
MAY	$3,549.93	$353.94	$168.33	$258.94	$209.53	$50.00	$55.15	$110.00	$0.45	$12.00	$2,470.38
JUNE	$3,761.01	$393.74	$183.82	$273.08	$220.40	$50.00	$55.15	$110.00	$0.45	$12.00	$2,127.21
TOTAL	$3,233.31	$309.23	$145.09	$234.72	$188.47	$50.00	$55.15	$110.00	$0.45	$12.00	$2,712.78
	$26,918.28	$2,826.24	$1,580.50	$1,980.52	$1,577.26	$400.00	$407.40	$880.00	$3.60	$96.00	$17,712.76
SHOULD BE											
NOVEMBER	$1,721.28	$102.60	$42.68	$121.82	$100.87	$42.04	$21.35	$110.00	$0.45	$12.00	$1,167.47
DECEMBER	$1,880.58	$121.10	$52.15	$131.99	$110.79	$43.71	$55.15	$110.00	$0.45	$12.00	$1,253.12
JANUARY	$2,107.26	$150.84	$62.87	$148.57	$123.49	$45.86	$55.15	$110.00	$0.45	$12.00	$1,398.03
FEBRUARY	$1,368.50	$76.14	$26.75	$107.13	$91.74	$40.50	$55.15	$110.00	$0.45	$12.00	$1,048.84
MARCH	$1,368.50	$76.14	$26.75	$107.13	$91.74	$40.50	$55.15	$110.00	$0.45	$12.00	$1,048.84
APRIL	$2,053.06	$143.27	$59.09	$144.42	$120.31	$45.32	$55.15	$110.00	$0.45	$12.00	$1,383.07
MAY	$2,272.32	$173.53	$74.52	$161.19	$133.18	$50.00	$55.15	$110.00	$0.45	$12.00	$1,502.32
JUNE	$1,735.82	$97.78	$36.56	$120.17	$101.72	$50.00	$55.15	$110.00	$0.45	$12.00	$1,152.00
TOTAL	$14,911.30	$939.40	$381.33	$1,042.22	$873.62	$367.93	$407.40	$880.00	$3.60	$96.00	$9,929.38
DIFFERENCE	$12,003.89	$1,886.75	$887.96	$918.30	$703.44	$42.07	$0.00	$0.00	$0.00	$0.00	$7,783.38

12,003.89+
-1,533.75-
857.95-
914.53-
8,520.89+

Page 1

Page #1 Fax Note 7671 Date 2-4-99 Pages 1

To Kelly From Mark

Co./Dept. Supt. Co. Phone # 620-90 Phone # 620-K

Fax # 372-6535 Fax #

APPENDIX 67 – [GIBSON] MEMORANDUM SUBMITTED IN OPPOSITION TO ADA COUNTY'S MOTION FOR SUMMARY JUDGMENT, NOVEMBER 1, 2004, IN THE MATTER OF *ADA COUNTY V. STACY A. GIBSON*, CV OC 0107394D

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

Case No. CV OC 0107394D

MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Lodged: November 1, 2004

ADA COUNTY,

Plaintiff/Counterdefendant,

v.

STACY A. GIBSON,

Defendant/Counterclaimant.

The Defendant above-named does oppose Plaintiff's Motion for Summary Judgment, and does respond to said Motion with those reasons and grounds contained herein and supported by the Affidavit filed herewith. There are substantial and genuine issues of material fact in dispute.

Appendix 67

HISTORICAL STATEMENT OF FACTS

The historical facts surrounding this case are described in detail in the Affidavit of Stacy A. Gibson, contemporaneously filed herewith.

STANDARD OF REVIEW

This Court is well acquainted with the case authority relating to Summary Proceedings. The authority cited by Defendant provides guidance on matters relating to the issues raised here.

The moving party in a summary proceeding must show the Court in what manner there is an absence of any genuine issues of material fact. The burden then shifts to the nonmoving party (Defendant herein) to show that some genuine issues of material fact do exist, and to such an extent it is more than just speculation, or a slight doubt or a mere scintilla of evidence to create a genuine issue. See Quinlan v. Idaho Comm'n for Pardons and Parole, 138 Idaho 726, 729, 69 P.3d 146, 149 (2003), and G & M Farms v. Funk Irrigation Co., 119 Idaho 514, 517, 808 P.2d 851, 854 (1991). See also Sprinkler Irrigation Co. v. John Deere Insurance Co., 139 Idaho 691, 85 P.3d 667 (2004).

Pursuant to Idaho case law, the standard of review is the same required of a District Court as it is for the Supreme Court when reviewing a ruling on Summary proceedings. See Friel v. Boise City Housing Authority, 126 Idaho 484, 887 P.2d 29 (1994); Roell v. Boise City, 130 Idaho 199, 938 P.2d 1237 (1997); Kolln v. St. Lukes Regional Medical Center, 130 Idaho 323, 940 P.2d 1142 (1997); Loftus v. Snake River School District, 130 Idaho 426, 942 P.2d 550 (1997); Kimbrough v.

Reed, 130 Idaho 512, 943 P.2d 1232 (1997); Orthman v. Idaho Power Company, 130 Idaho 597, 944 P.2d 1360 (1997); Blome v. Trustca, 130 Idaho 669, 946 P.2d 631 (1997). The pleadings, depositions and admissions on file, together with affidavits, if any, are reviewed by the Court, and only when there is no genuine issue as to a material fact, can a moving party be entitled to judgment or relief as a matter of law. See Hines v. Hines, 129 Idaho 847, 934 P.2d 20 (1997); Farm Credit Bank of Spokane v. Stevenson, 125 Idaho 270, 869 P.2d 1365 (1994); Eastern Idaho Agr. Credit Ass'n v. Neibaur, 130 Idaho 623, 944 P.2d 1386 (1997); Loftus v. Snake River School District, *supra*; Landvik by Landvik v. Herbert, 130 Idaho 54, 936 P.2d 697 (1997).

Upon consideration and review of the facts to determine whether to grant a judgment in any fashion, the Court must liberally construe the record in the light most favorable to the party opposing the motion, and must draw all reasonable inferences and conclusions in that party's favor, and if the Court determines that reasonable people have differed, or could reach different conclusions or draw conflicting inferences from the facts and evidence presented in the Record, the motion must be denied by the Court, and proceed to trial on the merits of the case. See Brooks v. Logan, 130 Idaho 574, 944 P.2d 709 (1997); Roell v. Boise City, *supra*; DBSI/TRI V v. Bender, 130 Idaho 796, 948 P.2d 151 (1997); Kolln v. St. Lukes Regional Medical Center, *supra*.

Findings of Fact made by a trial court in a summary analysis will not be set aside unless clearly erroneous. The reviewing Court will not be bound by any legal conclusions of a trial court and consequently, the District Court must carefully apply the applicable law, as the Appellate Court is free to draw its own legal conclusions from the facts found. See Highlands,

Inc. v. Hosac, 130 Idaho 67, 936 P.2d 1309 (1997). Upon appeal from mixed questions of law and fact, the appellate court will defer to the findings of fact based on what is found to be substantial evidence, and will exercise free review only over questions of law. See Marshall v. Blair, 130 Idaho 684, 946 P.2d 984 (1996); Loftus v. Snake River School District, *supra*; Mitchell v. Bingham Memorial Hospital, 130 Idaho 420, 942 P.2d 544 (1997); Powell v. Sellers, 130 Idaho 122, 937 P.2d 434 (1997).

MATERIAL FACTS AND GENUINE ISSUES IN DISPUTE

In this case, there exists genuine issues of material fact as to the amount of any alleged overpayment, and as to what offsets, credits and underpayments of Defendant's wages have yet to be accounted for and documented in the County's record-keeping process. Substantial underpayments remain as a result of the County's record-keeping errors. This significant accounting shortage was raised and demonstrated in Defendant's Second Amended Counterclaim (dismissed by this Court), and now evidenced further by the case authority cited in Defendant's Memorandum in support of her Motion requesting this Court to reconsider its Interlocutory Order entered September 16, 2004. The genuine issues are clearly demonstrated, as evidenced by Defendant's Affidavit filed in support of Defendant's Opposition to Plaintiff's Motion for Summary Judgment. Those specific issues of material fact in dispute in this case are as follows:

1. On at least seven (7) separate occasions, listed on seven (7) different documents, various Ada County personnel have alleged at least five (5) distinctly different sums the County has alleged were erroneously deposited into the

joint checking account of Defendant and her husband, as wage payments. On the first page of Sheriff Killeen's August 2, 1999 Notice of Intent to Impose Discipline (See Exhibit 29 of Stacy Gibson's Affidavit), Sheriff Killeen states the wage overpayment is $8508.88; on page 10 of Detective Glenn's Case Status Report (See Exhibit 30 of Stacy Gibson's Affidavit), Detective Glenn states the wage overpayment is $7,297.17; on Kelli Bolicek's August 11, 1999 communication to R. Monte MacConnell (See Exhibit 35 of Stacy Gibson's Affidavit), Ms. Bolicek declares the amount to be $8,528.89; on the attachment to Ms. Bolicek's August 11, 1999 letter, "Cheryl", who is at the Ada County Auditor's Office, calculated the wage overpayment to be $7,783.38; and in the December 27, 1999 letter to counsel (See Exhibit 55 of Stacy Gibson's Affidavit), Sheriff Killeen states the overpayment to be over $8,500.00.

The fact is Ada County personnel have stated different amounts, demonstrating their inability to perform their record-keeping responsibilities, and because of that functional inability, cannot allege in a summary judicial proceeding a purported sum that properly, correctly and accurately reflects a reconciled amount of the overpayment status, or the reconciliation as to what wages are yet due Defendant, as was identified in the counterclaim, and is specifically addressed in the Affidavit submitted to the Court. This account status and wage dispute represents a specific issue of material fact that is in dispute in this matter.

2. The Affidavit of Kelli Bolicek, sworn under oath, is a conclusory, speculative, and are incorrect portrayal of misleading, unsupported accounting, based upon hearsay from the calculations of the Ada County Auditor's Office, who have postulated different figures, and part of the erroneous record

presentation. These calculations cannot be relied upon by this Court for two (2) reasons. In paragraph 3 of her Affidavit, Ms. Bolicek asserts Defendant was mistakenly overpaid between October 1998 and June 1999. Defendant was "officially" *granted* transfer and promotion to the Sheriff's Jail Facility, as a Jail Technician II, effective October 16, 1998. That was identified in the Notice of Personnel Action, as authorized, approved and recommended by Sheriff Killeen, and approved by the Board of County Commissioners and County Human Resources Director, Terry Johnson. See Exhibit 15 of Stacy Gibson's Affidavit.

Pursuant to Defendant's transfer and promotion to the Jail Facility, Defendant was given an increase in monthly wages, pursuant to the Sheriff's Pay Plan, and it went from $1,500.00 monthly to $1,550.00 monthly. Ada County Payroll Department personnel were supposed to pay Defendant "½ month as Police Records Clerk and ½ month as Jail Technician." See Exhibit 15 of Stacy Gibson's Affidavit.

That it was in late October 1998, and after October, that Ada County Payroll Department personnel presented the administrative error they had created in Defendant's position and resulting wages, because of her job assignments. This consequence is a violation of the record-keeping requirements of the *Fair Labor Standards Act*, § 211 I. Entered on the erroneous records was the statement: "pay ½ month as Police Records Clerk and ½ month as Jail Technician." This "administrative error" is characteristic of Ada County's "two-rate" system of payment (referred to in Ada County's Complaint as a "mixed paycheck") and that was the culprit that they contend began the basis for the error, and caused Defendant's detrimental "mistaken receipt of money."

Appendix 67

It was sometime after November 1, 1998, but before November 30, 1998, and thereafter through July 19, 1999, that Ada County Payroll Department perpetuated the error and continued the County's violation of the *Fair Labor Standards Act*, § 211 I, and carried the accounting error into their direct deposit program. Not only do we have the erroneous process by which Payroll combined Defendant's monthly wages for what they assessed to be two (2) different jobs, but also Payroll mistakenly calculated her pay raise and overtime wages, the combined effect of which caused an unspecified overpayment to the joint account of Defendant and her husband, made by direct deposit for a period of what our research demonstrates to be eight (8) consecutive months. The County has never produced an accounting of this overpayment and mistaken pay raises, overtime wages, and underpayment issue, except as identified by those limited efforts undertaken by Kelli Bolicek. At the time this error was created, Defendant was fully *classified as a permanent status employee*, had vested rights under such tenured status, and was to receive all entitlements, benefits, rights and protection under the *Fair Labor Standards* Act (FLSA), 29 U.S.C § 201 *et seq.* and the *Idaho Public Employees Protection Act*, Idaho Code, § 6-2101 *et seq.*, as announced in the provisions contained in the Ada County Code, County Personnel System, § 1-7-1 through § 1-7L-10. See Exhibits 15, 20, 21, attachment page 1, 25, page 3, 29, page 1, 30, page 2 & 10, 35, attachment, 61, page 1, & 64 of Stacy A. Gibson's Affidavit.

The Affidavit of Kelli Bolicek unequivocally demonstrates Ada County's ongoing confusion concerning the complexity of the issues in this dispute, and the manner in which Ada County has instead elected to conceal the relevant accounting and material issues of fact surrounding their conduct.

3. Kelli Bolicek is not deemed qualified to submit an opinion as to the sum or sums Ada County has alleged to be an overpayment, or a reconciliation of the wage amounts due to Defendant. As a Finance Manager at the Ada County Sheriff's Office (her title at the time was Sheriff's Budget Director), her job description states she "monitors the overtime submitted by employees and prepares monthly report for the Sheriff". See Exhibit 1 attached hereto. Nothing in her job description would qualify her to access information required to reconcile, attest to or comment on the amounts Ada County allegedly "overpaid" or "underpaid" Defendant in step pay, raises or promotional advances. She has yet to reconcile the regular and overtime wages yet due to Defendant. Any statement or Affidavit of Ms. Bolicek is unreliable and must be considered hearsay on the issue of overpayments and underpayments. Those payroll issues include regular pay, overtime pay, holiday pay, vacation pay, deduction for State and Federal Taxes, FICA, PERSI, deferred compensation, dental plan deductions, health plan deductions, dependent life insurance, and retirement life insurance. This Court should not consider Ms. Bolicek's Affidavit as presenting any accurate, meaningful or correct account of what Defendant has coming for her wages, or for the repayment of any alleged or potential liability of an over-deposit in this dispute.

A Payroll Specialist with the Ada County Auditor's Office, or with an independent agency, would be qualified to provide an affidavit of an accurate accounting testimony concerning these payroll issues, based on the experience and involvement by Defendant with this agency. See Exhibit 2 attached hereto. Defendant must reject the opinion of the Finance Director (Budget Director) because of Ada County's ongoing confusion concerning the facts in this case, and the fact Ada County has alleged amounts, just as to the overpaid status, anywhere from

$7,297.17 to $8,528.89. If there is to be an accurate accounting of what Ada County has purportedly overpaid Defendant, it must be upon an order of this Court directing Ada County Payroll Department to engage the services of an independent payroll specialist agent to conduct an unbiased audit, retained at the County expense, with judicial authorization to reconcile all salary entitlements concerning Gibson for regular wages, overtime wages, compensation time, sick leave, earned vacation, insurance (medical, life, family), Workman's Compensation and disability benefits, retirement benefits, and all other benefits provided to Ada County employees, through the period of her protected and tenured employment as a classified permanent employee. Furthermore, such a Court order must direct the unbiased agent to reconcile the true and correct amounts Ada County has alleged was erroneously overpaid, from November, 1998 though June, 1999.

4. The most significant issue of material fact that precludes this Court from allowing summary disposition, is the reality Defendant has a Federal statutory "right of action" to recover from Ada County her wages due her pursuant to the causes of action detailed in her Second Amended Counterclaim. Once that judicial process is completed, Ada County may be entitled to an to "offset" as determined by an independent audit, from Defendant's recovery under that amended counterclaim, to restore the account status from their erroneous direct deposits to the joint checking account. Plaintiff may not deduct from Defendant's overtime wages still owed or from the amounts that should have been previously withheld. Such offsets are not among those permitted under FLSA, because Ada County erroneously overpaid Defendant. See Renteria v. Italia Foods, Inc., Case No. 02 C 495, United States District Court, N.D. Illinois, Eastern Division (2003).

Appendix 67

Defendant has always acknowledged there is the contention she was overpaid by virtue of Ada County's payroll errors, but no third-party reconciliation or auditing has been performed, after being requested numerous times by Defendant and her counsel. In the County's Motion for Summary Judgment, Ada County argues Defendant has placed the County in an inequitable position because she has not repaid the County. That concept not only lacks merit, but also logic. What is truly inequitable is the fact the County has not conducted the needed reconciliation or independent audit required in such a mandatory wage accounting process, even required by FLSA. Also inequitable is the decision of this Court that currently has precluded Defendant from engaging her Federal statutory "right of action" for recovery and what is yet due her from Ada County under FLSA, so she may recover everything she is owed by Ada County, eventually to include her employment reinstatement.

Another issue considered unfortunate or inequitable is to see this Court allow Ada County's theories of State prerequisites (notice-of-claim issues) offset a Federal right of action, and to engage this Court with their flawed arguments concerning this dispute. On page 7 of the County's Memorandum they would submit yet another false statement, and frivolously argue "Once the monies were put into her joint bank account, Ada County lost control of them and did not have the ability to recover those monies on its own". This serves to demonstrate our point of the County's absolute failure to understand this accounting debacle. Ada County possessed the exclusive right of debit on this account. These arguments are not just factually flawed, but entirely fallacious. Defendant was required to execute the Automatic Paycheck Deposit Authorization form on May 6, 1998, and that document authorized Ada County to "*initiate, if necessary,*

debit entries and adjustments for any credit entries in error to my account indicated above". See Exhibit 10 of Stacy A. Gibson's Affidavit. Ada County alone had the authority to seek debit entries and adjustments for any errors to Defendant's joint checking account, made or caused by them. Why does the County persist with this factual deceit? Ada County had the ability, the authority, and the right, to engage not only the accurate record-keeping (as required of them), but also a debit entry for any sums they may have overpaid to Defendant's joint checking account. The dilemma was the record-keeping errors they caused or created, were so extensive that Ada County finally chose to investigate the cause of their errors, first thought to be monies yet due to nine (9) employees for shorted overtime pay. Once they concluded Ms. Gibson had received an overpayment, instead of pursuing the pay reduction provisions under the County Code, they foolishly fired her for capricious reasons. What Ada County did do, unfortunately, when they decided to investigate the matter, was to let the process go in the wrong direction, and instead of investigating how the errors unfolded in the Payroll Department, the County agents interrogated Defendant, foolishly threatened her with malicious prosecution, retaliated and discriminated against her, for telling them the system has always been in error, and then decided not to pay her what they owed her, and then decided to terminate her employment altogether, all of which was being accomplished in violation of the *Fair Labor Standards Act*. This is what is fundamentally inequitable in this dispute, as Ada County created their own errors, and the County then failed to pursue the reduction in wages pursuant to § 1-7C-6B, A.C.C., and then wrongfully terminated a dedicated and loyal employee.

Once a legitimate reconciliation has been completed, and once this Court has allowed Defendant to proceed against Ada

County with the Federal statutory "right of action" conferred upon her by 29 U.S.C. § 216 (b), as a result of the County's violations of FLSA, this case only then may be equitably and lawfully resolved. Ada County is legally and morally required to reinstate Defendant's employment with the Ada County Sheriff's Office, with the requisite recovery of all back pay due for regular wages, overtime wages, and employment entitlements and benefits, in accordance with Defendant's protected status as a permanent and classified Ada County employee, which includes sick leave, vacation pay, additional holiday pay, additional overtime pay, step increases, cost of living increases, continued medical insurance benefits, continued family coverage benefits, continued life and disability insurance, Workman's Compensation coverage, retirement benefit funds for PERSI (representing 6% of total monthly wages) and PEBSCO (an employee contributory retirement plan), together with available training benefits, and recovery of all other benefits as a result of this "inequitable" wage and record-keeping procedure that caused the administrative error and some overpayment of Defendant's wages into a joint checking account under the direct deposit system used by the County. A true reconciliation of all such wages and benefits are required to address the "mistaken receipt of funds" from the County's negligence and ongoing violations of the FLSA provisions announced in 29 U.S.C. § 201 *et seq.*, and once those funds are paid to Defendant by Ada County, then an offset from such a reconciliation provided to the Court could be properly addressed.

Based upon the material facts existing and perpetuating within this dispute, as demonstrated by the Affidavit of Stacy A. Gibson submitted herewith, Defendant has unequivocally demonstrated factual disputes her right to eventual reinstatement, her right to receive offsets, her right to receive

credits for wages due her, and her right to an unbiased resolution, and Plaintiff's Motion for Summary Judgment therefore should be denied.

Dated This 1st day of November 2004.

S/ Vernon K. Smith
Vernon K. Smith
Attorney for Defendant/Counterclaimant

APPENDIX 68 – ADA COUNTY'S AFFIDAVIT OF KELLI BOLICEK, FILED IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT, SEPTEMBER 29, 2004, IN THE MATTER OF *ADA COUNTY V. STACY A. GIBSON*, CV OC 0107394D

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

Case No. CV OC 0107394D

AFFIDAVIT OF KELLI BOLICEK
IN SUPPORT OF MOTION FOR
SUMMARY JUDGMENT

Filed: September 29, 2004

ADA COUNTY,

Plaintiff/Counterdefendant,

v.

STACY A. GIBSON,

Defendant/Counterclaimant.

STATE OF IDAHO)
) ss.
County of Ada)

Appendix 68

KELLI BOLICEK, being first duly sworn upon oath, deposes and says:

1. That I am the Finance Manager at the Ada County Sheriff's Office and have worked at the Ada County Sheriff's Office since 1996.

2. That I am personally familiar with this case.

3. That the Eight Thousand Five Hundred Twenty Eight and 89/100 Dollars ($8,528.89) set forth in Ada County's Complaint in this matter reflects a net amount adjusted for taxes withheld that was mistakenly paid to Stacy Gibson between October 1998 and June 1999.

4. That as a result of her change in position from Records Clerk to Jail Technician, Stacy Gibson's base salary should have been increased from $1,500.00 per month to $1,575.00 per month. Though Stacy Gibson's base pay was originally shown as increasing to $1,550.00 instead of $1,575.00, the $25.00 discrepancy was corrected and she was compensated the difference as shown by a true and correct copy of a Notice of Personnel Action dated March 1, 2000, attached hereto as Exhibit A.

DATED this 29th day of September, 2004.

s/ Kelli Bolicek
Kelli Bolicek

Appendix 68

STATE OF IDAHO)
) ss.
County of Ada)

SUBSCRIBED AND SWORN to before me this 29th day of September, 2004.

s/ Betty Gjesdal
Notary Public for Idaho
Commission Expires *12/20/2008*

Appendix 68 – Exhibit A

NOTICE OF PERSONNEL ACTION

SHERIFF Sec. Sup.		Emp. General No.: 54224	Effective Date:	02/01/2000
Last Name: Gibson	First Name: Stacy	Middle: A.	Soc. Sec. No.: 518-78-2239	Sex/Race: F/C
Address: 5501 Tinker St. Boise ID 83709			Birth Date: 08/30/1956	Perm. Emp.: M
Class Title: Police Records Clerk II			Employee Status: Ent. Prob.	
Class Code: 127	Pay Grade: 60		Rate of Pay: $1,500.00 Per Mo. $18,000.00 Per Yr.	
FILL IN CHANGES ONLY:				
New Last Name:			New Step/Merit Status:	
New Address:				
New Class Title: Jail Technician II			New Employee Status:	
New Class Code: 680	New Pay Grade: 60		Last Rate of Pay: $1,575.00 Per Mo. $18,900.00 Per Yr.	

REMARKS:

Correction of Salary with 5% increase due to Promotion on 10/16/98
Please make retroactive to 10/16/98 ($12.50 - October 98):
11/98,12/98,1/99,2/99,3/99,4/99,5/99,6/99,7/99,8/99 - $25.00 ea month = $250.00
Total $262.50

Total Overtime Hours During this period: 227.25 X .14 = $31.82 Due

Grand Total Due: $293.32

EMPLOYER Signature / Date	ADA COUNTY COMMISSIONER ☐ Approved ☐ Disapproved Date Date Date
APPOINTING AUTHORITY Authorized Signature Official Title: 3-1-00 Date	DIRECTOR OF HUMAN RESOURCES Date

White — HR Dept. Yellow — Payroll Dept. Pink — Originating Dept. Gold — Employee

EXHIBIT
A

BEST AVAILABLE COPY

APPENDIX 69 – LETTER FROM ADA COUNTY UNDERSHERIFF, GARY RANEY (LATER ELECTED SHERIFF), TO DAWN K. MCKINNEY, DATED JUNE 1, 2004, ADVISING REASONS SHE WAS SENT COMPENSATION DUE TO COUNTY'S MISUSE OF "7K" EXEMPTION

June 1, 2004

Dawn K. McKinney
1856 North Swainson Avenue
Meridian, Idaho 83642

Dear Dawn:

I want to take this opportunity to explain the enclosed check. Many years ago, most jail technicians were put on the same schedule as commissioned jail deputies, both for continuity of the work and because it seemed to offer a benefit to the employees by having the four-on, four-off schedule. At that time, the Sheriff's Office believed that federal law allowed the schedule for law enforcement personnel who worked in the jail. During the last few months, I have taken a fresh look at our practices in light of emerging case law under the Fair Labor Standards Act. I now believe that, regardless of the past interpretations, the working conditions for jail technicians today do not meet the criteria necessary to work someone under the 7K exemption to the FLSA.

As you know, you received at least straight time (1:1) compensation for all hours you worked while you were on the four-on, four-off schedule. You also were compensated for all hours over forty-eight in a week's period. A careful examination and recalculation (using 40 hours per week as the

Appendix 69

scheduled number of hours) of your timesheets resulted in the number of previously uncompensated hours. The calculations are identical to how all overtime is/was calculated, i.e. after working (actual hours) forty hours in a given week, deducting any time already compensated at the 1.5 rate, the remaining time over forty hours equals your uncompensated hours due. Because you were already paid straight time for those hours, the remaining hours were multiplied by .5 at your highest rate of pay. This check represents the difference between the straight time you earned and the additional half you should have earned after a forty-hour week.

Also included in this check are two factors that represent our apology to you for not calculating this properly the first time. One is that the rate calculations are at the highest hourly wage you earned as a jail technician, regardless of when it went into effect. Secondly, we have added an additional 5% to the total for your convenience.

Using the Fair Labor Standards Act as a guide, we went back two years for calculations. Time sheets were recalculated for the time you worked as a 7K exempt jail technician between June 1, 2002, and June 1, 2004. The enclosed check has been treated as a paycheck, that is, taxes, etc. have been deducted.

I want to take this opportunity to thank you for your work while you were here and express my hope that you feel we are doing the right thing by being forthright in correcting a past mistake. Please sign the enclosed Release and mail it back in the self-addressed stamped envelope. If you have any questions, you may contact Captain Randy Folwell at 377-6711 or me at 377-6505.

Appendix 69

Sincerely,

VAUGHN KILLEEN
Ada County Sheriff

s/ Gary Raney
Undersheriff Gary Raney

Enclosures

APPENDIX 70 – THE FLSA "RELEASE" OR "WAIVER" ENCLOSED WITH LETTER (APPENDIX 69) UNDERSHERIFF, GARY RANEY, SENT TO DAWN K. MCKINNEY, DATED JUNE 1, 2004

I, _____ hereby acknowledge receipt of _____ ($_____) from Ada County as payment in full for unpaid wages, employment benefits, and other compensation due me as a result of employment with the Ada County Sheriff's Department. I accept this amount as full payment of unpaid wages and benefits under the Fair Labor Standards Act.

_____

Signature

APPENDIX 71 – LETTER FROM GIBSON'S COUNSEL TO ADA COUNTY SHERIFF, VAUGHN KILLEEN, DATED JUNE 1, 2004 (STEMMING FROM DISCOVERY OF APPENDIX 69), REQUESTING THE COUNTY DISBURSE FUNDS TO GIBSON BECAUSE OF THE MISUSE OF THE "7K" EXEMPTION WHICH CAUSED UNDER COMPENSATION TO HER AS A JAIL TECHNICIAN

June 1, 2004

Vaughn Killeen
Ada County Sheriff
Ada County Sheriff's Office
7200 Barrister
Boise, ID 83704

Dear Sheriff Killeen:

It has come to our attention that on Thursday, May 27, 2004, Ada County Payroll, through the assistance of the Sheriff's Office, made disbursements of funds to individual "white shirt" employees of the Jail Facility due to your department's historical misapplication of the "7k exemption" to its employees.

On February 2, 2004, Ms. Stacy A. Gibson filed an amended counterclaim against Ada County and the Sheriff's Office. In that amended counterclaim, it was specifically detailed the concerns as to the historical abuse and misapplication of the mandatory obligations as required by the *Fair Labor Standards Act*, 29 U.S.C., § 201 *et seq.* (FLSA), and specifically including your department's ongoing violations of the "7k exemption".

Appendix 71

It appears that on March 2, 2004, the Board of Commissioners held a staff meeting with members of your department, and on March 5, 2004, a member of your department (Mike Laky) sent out his e-mail to numerous Sheriff's Office employees concerning how "white shirt" work shifts were going to be changed from 12 hour shifts to 10 hour shifts. The e-mail states the "change was needed to bring us in line with FLSA rules", and that the "change will take place on April 4th along with the normally scheduled Jail shift change".

It has now been communicated to us that the County Commissioner's allotted approximately $250,000.00 to your department to pay the overtime due to the Jail Facility "white shirts" because of the ongoing "7k exemption" violations, and on Thursday, May 27, 2004, those "white shirts" affected by your department's failure to reimburse overtime, have now received those past due amounts owed to them.

At this time, we request you direct a true and correct accounting and reconciliation of all wages owed to Stacy Gibson that will address your incorrectly applied interpretation of the FLSA "7k exemption". Submit that information to my office, along with a check made payable to Stacy A. Gibson for those funds owed her for overtime pay mandated by the *Fair Labor Standards Act*.

I await your response, and until then, I remain,

Yours very truly,

s/ Vernon K. Smith
Vernon K. Smith

VKS/jmg
cc: Ray J. Chacko

APPENDIX 72 – LETTER FROM GIBSON'S COUNSEL TO ADA COUNTY ATTORNEY, RAY J. CHACKO, DATED JUNE 18, 2004, ADVISING AWARENESS ADA COUNTY UNDER COMPENSATED JAIL TECHNICIANS BECAUSE OF THE VIOLATION OF THE "7K" EXEMPTION, KNOWLEDGE OF THE COUNTY'S RECENT EFFORTS TO DISBURSE FUNDS TO JAIL TECHNICIANS FOR UNDER COMPENSATED OVERTIME, AND DEMAND ADA COUNTY DISBURSE FUNDS TO GIBSON IN A NON-DISCRIMINATORY MANNER, PURSUANT TO FLSA

June 18, 2004

Ray J. Chacko
Deputy Prosecuting Attorney
Ada County Prosecutor's Office
200 West Front Street
Room 3191
Boise, ID 83702

Dear Mr. Chacko:

I received your letter of June 7, 2004, expressing concern over my letter to our elected official (Ada County Sheriff) concerning disbursements being made to past and present employees who were shorted pay under the misuse of the "7k exemption".

The letter was sent to this elected official (the Sheriff), as he is officially charged with the responsibility for making those pay adjustments and pay disbursements, or be subject to charges and severe penalties under the provisions of the *Fair Labor Standards Act* (FLSA), Title 29 U.S.C. § 216, which

you have now come to be familiar. I sent a copy of our correspondence to your office so you would be aware of my official communication and demand to the elected Sheriff of Ada County. The purpose of my letter is set forth in its contents.

If you believe this subject matter is exclusively confined to our pending litigation, and you, as an attorney for the Sheriff and Ada County, want the exclusive right of contact, then I must also assume you have accepted the official responsibilities to make certain these disbursements are made, not inappropriately withheld, as a delegate of the responsible party under Federal law. You cannot hold back funds on some theory there may eventually be a settlement of the litigation, or some other basis to withhold wages. That constitutes a willful violation of FLSA. (Please review Title 29 U.S.C. § 215 (a)(3).

We have received confirmation the Ada County Sheriff's Office is distributing funds to all past and present employees not paid for their services as required under FLSA, due to the misuse of the "7k exemption". The Commissioners had set aside $250,000.00 to fund this corrective effort. The Ada County Sheriff has exclusive documentation on who these past and present employees are, and would have the accounting for what disbursements are to be made to each employee. The Sheriff has a duty to disburse those funds to the employee, or yet another claim comes into being for unlawfully withholding payments well past due for wages and salaries owing. A class action suit may not be forestalled if disbursements are withheld. Knowing a disbursement to Ms. Gibson has been allocated, it must be distributed, but for some reason under your control, if it is being withheld, concealed or denied to her, awaiting possible settlement of our pending legal disputes, then

I need to know that information so I may take such action as necessary to secure payment to her or undertake further action for this confirmed FLSA violation, and now the County's refusal to disburse the wages after the repository official (County employer) has confirmed the violation and funds have been allocated to make payment.

It was never my understanding you had assumed the role to disburse the wages and earnings of these past and present employees, when appearing as counsel for the County and Sheriff's Office in the reimbursement wage claims dispute, Case No. CVOC 0107394D. It remains my understanding the Ada County Sheriff has that sole duty and responsibility under the role as employee supervisor. It is possible this duty may have been delegated to the County Payroll Department, but there has been no indication of that to date. I sent a copy of the letter directly to your office so you would be fully apprised that an accounting has been made from the FLSA violations under the "7k exemption", and that disbursements were being made to past and present employees to rectify the wages wrongfully withheld previously. I do not share your perception that my letter to a public official violates Rule 4.2 of the *Idaho Rules of Professional Conduct*, under your expressed theory a suit in court prohibits official correspondence to elected County officials who are charged with the responsibility and duties of maintaining the wage and employee records of past and present employees. Litigation pending over ongoing wage and record-keeping violations within the subject matter of that litigation does not abolish our need to make formal demands upon public officials to perform their official duties under Federal law. If the Sheriff (or you) choose to discriminate against Ms. Gibson because of the pending Complaint, then a new violation has come into being under Title 29 U.S.C. § 215 (a)(3).

If it be your attitude you do not want me to contact the official employer to make official demand from the only responsible party, the Ada County Sheriff's Office, the repository of these wage records and the department with the responsibility to make these disbursements and payments, then I must put the burden upon you to immediately undertake the action necessary to cause that appropriate disbursement to us forthwith, identifying the specific pay records, hours and adjustments being made for wages due Ms. Gibson as a result of these violations of the "7k exemption". We know these funds have been allocated and disbursed, but she has yet to receive her disbursement, and my office has not been advised of the accounting for her wages.

If Ms. Gibson's disbursements are being withheld, merely because you say we are in litigation with Ada County and the Sheriff's Office over her wrongful termination, or over the wrongful accounting, or over the inaccurate and inadequate pay records and wage accounting records, or the Workmen's Compensation dispute over her workplace injury, or some misperceived theory of a statute of limitations, then it would appear she is being denied wages due and owing her, for willfully wanton reasons. Her counterclaim (complaint) over FLSA violations effectively tolled the statute in any event, as the subject matters of wages, accounting, withheld payments and overpayments, date back in every respect to Ada County's suit filed on November 7, 2001. See Rule 15 (c), I.R.C.P., and Title 29 U.S.C. § 255. If you withhold the accounting and disbursement for this confirmed violation of the "7k exemption", she would have a further cause of action for yet another willful FLSA violation, and that results in statutory charges against the Ada County Sheriff, and whoever else may claim responsibility for such disbursements. Also, be assured there is a $10,000.00 fine for such willful violation of FLSA,

well knowing the withheld wages must be disbursed to past and present employees, and Ms. Gibson's funds are being withheld, and she is being discriminated against because she has filed one or more complaint(s). See copy of memorandum from R. Monte MacConnell we have obtained, dated December 27, 1997 attached hereto.

Because of this willful conduct, and deliberate disruption of all official avenues of communication, we now make demand upon Ada County, through this letter to you, for not only her past wages wrongfully withheld under the "7k exemption", but also our statutory liquidated damages, which is a mandatory assessment equal to the wage and disbursements withheld. See 29 U.S.C. § 216 (b). Once again, these events are seen as deliberate stonewalling and bad faith, and being done wrongfully, because Ada County is retaliating against Ms. Gibson over her unwillingness to resign under threat of termination and malicious prosecution, and her reliance upon her rights protected by this FLSA employment. A Federal Court would not tolerate this ongoing conduct like the more lenient protective Ada County Courts are inclined to do in these misguided agency mishaps. The "behavior" actually in question is the County's treatment of their employees, not some perception of behavior to have inappropriate contact with an elected official, thinking somehow we want to or even could influence any of them, in violation of Rule 4.2. All we would ever want Ada County to do, just like any other agency or citizen, is to obey the Federal and State law.

If it be your desire to accept the responsibility and duty for disbursement of these funds from such an assignment from the Sheriff, then it may be an attempt to delegate that responsibility and duty of the wage and record-keeping

process, and the Federal authority is quite clear on the point; no such delegation, assignment or transfer of that authority is allowed or acknowledged under the law, and the liability and responsibility continues with Ada County and the Ada County Sheriff's Office to undertake the accounting, record-keeping, and disbursement of these funds.

For "any person" (whether it be a Sheriff, a Legal Advisor, a Detective, a County Attorney, or a Commissioner), to aid or abet an employer in any process or proceeding that allows an employee to be discharged, or retaliated against for engaging in their protected rights and activities under the *Fair Labor Standards Act*, it is considered to be unlawful conduct. See 48A Am Jur 2d, § 4456 & § 4457 (1997).

According to your June 7, 2004 letter, and my brief discussions with you on June 16, 2004, I am inclined to believe her disbursements are being withheld because of the pending suit, or maybe because of a limitations issue, each of which is wrongful. Under no circumstance are we attempting to settle our litigation over the wage-reimbursement dispute; the pending action concerns elements beyond the "7k exemption" misuse, and the limitations issue was tolled, not to mention also the "acknowledged violation" is just recently confirmed. These known wages are due; the "7k exemption" misuse has been confirmed by investigation and now stopped, and an accounting has been conducted, and without argument, or any debate, or need for any global settlement of other issues, these funds were wrongfully withheld, and Ms. Gibson, as well as all others, have a right to mandatory liquidated damages, and in Ms. Gibson's case, must be paid, and if Ada County continues to violate their mandatory record-keeping and pay responsibilities as required by the provisions of FLSA, § 211 (c), and continues to withhold her earned wages on any theory

of pending litigation or her complaint(s), or the statute of limitations, then Ms. Gibson (whose first name is spelled Stacy, not Stacey) will advise the Department of Labor, and effectively cause a Federal investigation, and she will file suit in Federal Court, which will necessarily include charges and further fines for such violations.

If you have assumed the duty and responsibility for this payment, and if you are saying the funds due Ms. Gibson will be withheld and will not be paid as required under FLSA, for whatever may be your reasoning, then please make that point crystal clear to me, so I will fully understand what your logic and choice has been. I will then be instructed to report this to the Department of Labor, and file a new suit against Ada County, the Board of Commissioners and the Ada County Sheriff's Office (any others claiming responsibility) in Federal Court, setting forth the illegal and unlawful withholding of the accounted for disbursement of wages owing a former County employee, as a result of the acknowledged misuse of the "7k exemption" and seek not only the appropriate wage, liquidated damages, attorney fees, and charges under the statute for such violations, but also civil penalties ($10,000.00) as allowed and enforced under such situations. The Department of Labor supports actions to recover wages and mandatory liquidated damages, interest, fees and costs.

Ada County has become so entrenched in its recalcitrant conduct towards Ms. Gibson that it appears to have clouded its assessment of these elementary legal disputes, the need for official demands, and a compromised attitude as to the exercise of their duties to its many loyal employees.

Of interest, on June 16, 2004, the U.S. Postal Service announced that 41,434 postal workers had been overpaid due

to a computer error. The total amount of the overpayment was $165,736,000.00 (our case is a dispute over erroneous deposit of $8,528.89). Not one of those workers were interrogated, falsely accused, threatened by extortion, or terminated because of the administrative error. See attached copy of news article.

We have also been informed the Sheriff's Office recently elected to change the manner in which non-commissioned employees (white shirts) will be compensated. It is our understanding only commissioned officers and dispatch personnel will now be compensated under the Sheriff's Pay Plan, and additionally, all Sheriff's Office employees no longer will receive longevity pay. There is concern among some employees they will be discriminated against because of this impromptu modification to the manner in which their earnings will be considered, especially by those who are aware of the manner in which Ms. Gibson was treated.

Other employees of the Sheriff's Office currently have concern about the manner in which they will be compensated. Some "white shirt" Jail Technicians will be "reclassified" to detention officer status due to the Jail Facility expansion. Undersheriff Gary Raney addressed this matter on March 2, 2004, during the Sheriff's Office Staff Meeting with the Ada County Board of Commissioners. If the Sheriff's intention is to compensate those "reclassified" non-commissioned employees by still utilizing the "7k exemption", it remains questionable, as it will take more than changing the employee's job title in order to become compliant with FLSA. If you need further information regarding this issue, refer to Title 29, Part 553 of the Code of Federal Regulations.

Once again, because you have chosen to officially assume the responsibility for all communications, demands and

Appendix 72

payment of these disbursements, you would have the corresponding duty to communicate our demands to the officials, and I trust you will make certain our demands are brought to the attention of the responsible parties (the Sheriff and the County Commissioners). If this misused "7k exemption" fund is not disbursed to Ms. Gibson, together with the mandatory liquidated damage assessment (its double instead of treble as is the case in other civil disputes), and disburse these funds to my office within ten (10) days, then I will be instructed to regard this letter as the last demand and final effort to get performance from the County, and the Sheriff, and will be assigned the task to proceed to Federal Court on the discriminatory violation proceeding. This letter to you is the only means of communication you have chosen to allow us as a means of access to our elected responsible officials, so please act accordingly. I remain,

Yours very truly,

Vernon K. Smith

VKS/jmg

Enclosures

APPENDIX 73 – [GIBSON] VERIFIED SECOND AMENDED COUNTERCLAIM, FILED FEBRUARY 2, 2004, IN THE MATTER OF *ADA COUNTY V. STACY A. GIBSON*, CV OC 0107394D

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

Case No. CV OC 0107394D

SECOND AMENDED COUNTERCLAIM

Filed: February 2, 2004

ADA COUNTY,

Plaintiff/Counterdefendant,

v.

STACY A. GIBSON,

Defendant/Counterclaimant.

COMES NOW The Defendant above named, as a Counterclaimant herein, and for a Second Amended Counterclaim against Ada County, does allege as follows:

GENERAL ALLEGATIONS

1. That Ada County is a political subdivision of the State of Idaho.

2. That Stacy A. Gibson (hereafter Gibson) is a resident of Ada County, Idaho.

3. That Gibson did submit her application for employment to the Ada County Sheriff's Office, a Department of said Ada County, on April 22, 1997, for position of Police Records Clerk I.

4. That Gibson did agree to the Sheriff's Office Hiring Standards and conditions of employment on April 29, 1997.

5. That Gibson was hired and became an "employee" of said Ada County, and specifically the Ada County Sheriff's Office as defined by § 6-2103 (3), Idaho Code; Ada County Code, County Personnel System, Chapter 7, § 1-7-1 through § 1-7L-10; and the *Fair Labor Standards Act* of 1938 (FLSA), as amended, Title 29 U.S.C., § 203 (e), and was paid by said Ada County as her employer, through the Ada County Payroll Department.

6. That Gibson was initially employed as a Records Clerk I, assigned to the Boise State University (BSU) Substation of the Sheriff's Office, at a designated wage of $1,215.00 each month, effective July 10, 1997.

7. That effective October 1, 1997, Gibson was given an increase in wages from $1,215.00 monthly to $1,350.00 monthly, based upon the Sheriff's Pay Plan (11.1%).

8. That on July 29, 1998, Gibson was recommended and approved for "Permanent Status" employment with Ada County, and granted permanent status as a "classified employee", effective August 1, 1998, pursuant to Ada County Code, § 1-7E-2A & B.

9. That Gibson was given an increase in wages, through the Sheriff's Pay Plan, from $1,350.00 monthly to $1,500.00 monthly.

10. That in January 1998, Gibson was *approved* for transfer and promotion, and was officially transferred to Jail Technician II, effective October 16, 1998.

11. That pursuant to said transfer and promotion, Gibson was given an increase in wages, pursuant to the Sheriff's Pay Plan, from $1,500.00 to $1,575.00 monthly (but incorrectly entered as $1,550.00 monthly), and Ada County Payroll Department erroneously erred by entry of her pay status based on "½ month as Police Records Clerk and ½ month as Jail Technician."

12. That Gibson was to have received her promotional five percent (5%) increase to $1,575.00 monthly, for service as a Jail Technician II, required by Ada County Code, § 1-7C-5A; however, due to said administrative record-keeping errors, she was erroneously paid $1,550.00.

13. That Gibson's *employment* was created, governed and *protected* by various provisions of State, County and Federal laws, including the Ada County Code, County Personnel System, § 1-7-1 through § 1-7L-10, the *Idaho Public Employees Protection Act*, § 6-2101 *et seq.*, Idaho Code, the provisions of the Federal *Fair Labor Standards Act* of 1938, (FLSA), as amended, Title 29 U.S.C., § 201 *et seq.*, and also protected by the Ada County Sheriff's Office Policy Manual.

14. That all compensation earned by Gibson as an employee of Ada County, was *controlled* by various laws and provisions, including Chapter 4.00, Ada County Sheriff's

Office Policy Manual; Ada County Code, § 1-7C-1 *et seq.*; the *Idaho Public Employees Protection Act*, § 6-2101 *et seq.*, Idaho Code, and *regulated* by the terms, conditions and provisions of the *Fair Labor Standards* Act (FLSA), Title 29 U.S.C., § 201 *et seq.*

15. That pursuant to the mandatory provisions of FLSA, §203, § 206 and § 207, Gibson was deemed to be an "hourly" wage-rate employee, contrary to any implied fixed monthly "salary" classifications, as may be identified on any "pay vouchers", "claim forms", or Employee Classification/Pay Schedules of Ada County.

16. That on December 23, 1997, while Gibson was employed at the BSU Substation of the Ada County Sheriff's Office, the Legal Advisor to the Ada County Sheriff, confirmed the ineligibility of the "white shirt" staff members of the Sheriff's Office to the FLSA "7k exemption" as a means of compensating those employees, as such staff members were not considered "law enforcement" personnel under the provisions of the Federal enactment (FLSA). That said Gibson was a "white shirt" staff member.

17. That Ada County, its Ada County Payroll Department, and the Ada County Sheriff's Office, had no basis to utilize the "7k-exemption" (FLSA, § 207 (k)) in the determination and disbursement of wages for overtime hours worked by Gibson while employed with Ada County, as so regulated and prohibited by Title 29, Part 553 of the Code of Federal Regulations, § 553.211 and § 553.212.

18. That in late October 1998, Ada County Payroll Department personnel did create further administrative errors in Gibson's classifications and wages, in violation of not only

the "7k exemption", but also the record-keeping requirements of the *Fair Labor Standards Act*, § 211 (c), by entry of erroneous records with the statement: "pay ½ month as Police Records Clerk and ½ month as Jail Technician." That said entry and "administrative error" was characteristic of Ada County's "two-rate" system of payment (sometimes referred to as a "mixed paycheck" which did effectively cause Gibson's "mistaken receipt of money", as hereafter alleged).

19. That on April 22, 1998, the Ada County Board of Commissioners requested employees, including Gibson, to participate in the County's Direct Deposit Program, where the County would directly deposit all monthly pay into the employee's bank account, and stated: "Your monthly pay will automatically be deposited into a checking or savings account of your choice *without any action by you*."

20. That Gibson executed the Automatic Paycheck Deposit Authorization form on May 6, 1998, and authorized Ada County to make direct deposits, and "*initiate, if necessary, debit entries and adjustments for any credit entries in error to my account indicated above*".

21. That after November 1, 1998 and through July 19, 1999, the Ada County Payroll Department did perpetuate continuing violations of the *Fair Labor Standards Act*, § 211 (c), by mistakenly calculating the pay raises and overtime wages, with the mixed pay and erroneous entries, the combined effect of which caused overpayment in the direct deposit to the joint account of Gibson and her husband, for a period of eight (8) consecutive months. That during this period of employment, Gibson was fully *classified as a permanent status employee*, had vested rights under such tenured status, and was to receive all entitlements, benefits, rights and

protection under the *Fair Labor Standards* Act (FLSA), 29 U.S.C § 201 *et seq.*, as announced in the provisions in the Ada County Code, County Personnel System, § 1-7-1 through § 1-7L-10, and the *Idaho Public Employees Protection Act*, Idaho Code, § 6-2101 *et seq.*

22. That from January 1999, through June 30, 1999, Gibson worked 281 hours overtime. These overtime hours, however, were calculated by Ada County pursuant to misapplication of the FLSA "7k exemption", identifying Gibson inappropriately as "law enforcement" personnel. That of those accrued overtime hours, 128 hours was taken as "cash compensation", and 153 hours was held as compensatory time" reserve for future use and discretion. That under the federal *Fair Labor Standards Act* (FLSA), 29 U.S.C. § 207 (k) and the *Code of Federal Regulations*, Title 29, § 553.230, an employee actually begins to accrue overtime compensation once the sum of 171 hours is worked within a twenty-eight (28) day period.

23. That from January 1, 1999 through June 30, 1999, Gibson worked beyond her scheduled regular shifts, and did accrue said 281 hours of overtime but did not challenge the inaccuracies of the County Payroll Department computation of said wages, salary and overtime accruals, as Gibson was before told all errors would be corrected by Payroll, and if she, as other employees, wanted to receive a paycheck, the employee was required to sign the pay voucher (at times referred to as a claim form), even though it was incorrect. Gibson does allege, and by virtue of law, does aver, that the issue of employment rights under the *Fair Labor Standard Act* cannot be abridged or ever waived; that the *Act* compels the employer (solely) to make, keep and preserve accurate employee wage records; that the employer cannot transfer or attempt to transfer any

responsibility under the *Act* to the employee; that any failure of the employer to comply with the *Act* will be at the employer's own peril, and the employer is subject to all ramifications and sanctions. That all said administrative errors of Ada County do constitute violations of the *Fair Labor Standards Act*, § 211 (c), as set forth above.

24. That from October 16, 1998 through July 20, 1999, Gibson did work a total of 112 scheduled regular shifts (12 hours each), and during each of those shifts, was required to report to her workstation (Jail Facility) fifteen (15) minutes prior to start of each such work shift, for a mandatory briefing; that Gibson has never been compensated for any of those briefings as required to be paid under the provisions of FLSA. That Gibson does allege, and by virtue of law, does aver, that said failure to compensate Gibson for each of those said mandatory fifteen (15) minute briefing periods constitutes a violation of the *Fair Labor Standards Act* for each of the 112 work shifts.

25. That on July 20, 1999, pursuant to order from Sheriff Killeen, Detective Arville Glenn met Detective Scott Johnson to discuss the administrative errors discovered in direct deposits to Gibson's joint account, as discovered by Kelli Bolicek, Budget Director at the Sheriff's Office, on July 19, 1999. That on July 19, 1999, Merrily Wilfong, Payroll Technician within the Ada County Payroll Department, sent Kelli Bolicek a detailed accounting of nine (9) Sheriff's Office employees who then were believed to be among those employees shorted pay from October 1998, through June 1999. That Gibson was one of those nine employees Payroll thought was actually owed back pay for overtime wages. That Ada County determined their own Payroll Department had created and perpetuated an administrative error as to Gibson's wage

and benefit records with a result and to the effect the County was disbursing overpayments to Gibson's bank account, through the Ada County's direct deposit program. That said disbursements were causing a mistaken receipt of funds into said joint account, all being the result of the County's error and resulting violations of the *Fair Labor Standards Act* (FLSA), 29 U.S.C. § 211 (c).

26. That on July 20, 1999, said Glenn telephoned Gibson, then on medical leave recovering from back surgery, and requested she come to the Sheriff's Office. Gibson met Glenn at 3:00 p.m., believing it was a "special duty" work assignment needed to be addressed when she returned to work after recovery from surgery.

27. That said Glenn and a participating Detective, Scott Johnson, undertook interrogations of Gibson, constructively designed, orchestrated and conducted to intimidate and to confrontationally threaten said Gibson, knowing Gibson was protected from any such act in signing the pay voucher, as she was required to sign it by Ada County Payroll Department, and the error was created and perpetuated in violation of the record-keeping requirements of § 211 (c) of the *Fair Labor Standards Act*; that said Ada County Sheriff's Office agents were conducting retaliatory and discriminatory action against a protected employee, and said "interrogations" and "investigation" was a proceeding under and related to the substance protected by the *Act*.

28. That Ada County Sheriff, Vaughn Killeen, persisted in his endeavor to thereupon accuse Gibson of some element of misconduct upon the discovery of said overpayments, and was the official of Ada County who did instruct these two detectives to sequester and interrogate said Gibson on July 20,

1999, and under his orders, said detectives did accuse Gibson of unlawful activities, threatened her with felony criminal charges, threatened to maliciously prosecute her, threatened her with jail time, called her a thief and a liar, and placed her on administrative leave and suspended her with pay. That said Sheriff blamed Gibson for what happened and tried to transfer the consequential effects of those FLSA record-keeping responsibilities and violations to said Gibson, and attempted to use that unlawful transfer as his cause to accuse Gibson of wrongdoing, and claimed her violations of County Policy, and unlawful acts, did discriminate against her, retaliate and then wrongfully terminate her, solely because of the erroneous wage and record-keeping process in effect with the Ada County Payroll Department and its Sheriff's Office. That such sequence of events resulted in an exploitation of Gibson's employment protection and her employment rights, and did cause a discriminatory retaliation against Gibson, a violation of said FLSA enactment, 29 U.S.C. § 215 (a)(3).

29. That in fact, the underlying cause of this administrative error was determined to be the flawed accounting process and use of a pay voucher, kept in effect by the County until approximately January 10, 2002, when the events of such non-compliance were made a major issue and disclosure of concern within Ada County, and administrative efforts were taken to find a way to come into "some level of" compliance with the Federal mandates of FLSA.

30. That these interrogations of Gibson caused detrimental physical and psychological injury to her as a result of the actions of these County agents acting, then under orders and direction of the Ada County Sheriff; That these detrimental effects caused Gibson to remain unemployed and in such unemployable state for over one (1) year.

31. That Gibson did at such relevant times, have certain rights and protection afforded to her as an employee of the Sheriff's Office § 7.05, Ada County Sheriff's Office Policy Manual, when a member becomes subject to any internal investigation; that Subparagraph 7 of § 7.05, specifically states, "No member will be subjected to punitive action because of the exercise of privileges granted under this order or the exercise of any rights under the U.S. Constitution, Idaho Constitution, or applicable law."

32. That Gibson does allege, and by virtue of law, does aver, these interrogation proceedings were a violation of the Ada County Sheriff's Office Policy Manual and Ada County Code, and a violation of the Fair *Labor Standards Act*, § 215 (a) (3), as Gibson was subjected to threats of punitive action in the form of words or statements such as "criminal court", "extortion", "grand theft", "felony record", "fine", "restitution", and "felon", all of which statements were in violation of the Ada County Sheriff's Office Policy Manual, § 7.05, and in violation of her freedom, property rights and interests, and her constitutional and statutory protections.

33. That during said interrogations on July 20, 1999, Gibson did, on several occasions, articulate to the Detectives she had found previous record-keeping errors in her "pay vouchers'; that she had contacted Karen Bond about those "pay voucher" errors after being instructed to do so by her Supervisor, Sergeant Gary Rouse; that Karen Bond had stated to her, "if she wanted to get paid anything, she had to sign the voucher, even if it was incorrect"; that after numerous attempts with no success at having Ada County Payroll Department issue a correct "pay voucher"; that Gibson, as all other employees, succumbed to living with incorrect "pay vouchers", and never made further attempts to reconcile, challenge, read

or verify the "pay vouchers", as they were considered to be incorrect as a matter of accepted County practice.

34. That Gibson did further articulate, while being interrogated and held responsible for the administrative error created and perpetuated by Ada County Payroll Department personnel; that it was not her responsibility or under her job function as a Jail Technician, to keep payroll records or to assure completeness and accuracy of any payroll, wage or benefit records, and such vouchers were historically known to be and accepted as being routinely in error.

35. That Gibson did further attempt, in good faith, to resolve the overpayment mistake during that interrogation affront on July 20th, as she proposed several times to said Detectives, simply to take all of her accrued overtime, compensatory time and vacation time to repay (or offset) the overpayment caused from the County's administrative error.

36. That following this interrogation process, on July 28, 1999, Gibson's counsel received a phone call from Mr. R. Monte MacConnell, Sheriff's Legal Advisor, who stated the Sheriff specifically wanted Gibson terminated, and if Gibson did not resign from the Sheriff's Office, she would be processed with felony charges for grand theft and fired forthwith.

37. That Gibson refused to act upon that threat and proposed resolution of resignation, and exercised her right to maintain her tenured employment and preserve her vested property rights in accordance with the protections afforded her.

Appendix 73

38. That on July 23, 1999, Ada County prepared a Notice of Personnel Action, wherein it was stated, "Effective 7/23/99", "Paid Administrative Leave", and "Delivered Notice of Intent to Terminate".

39. That on July 28, 1999, Gibson formally declined to relinquish her employment with Ada County under the coercive attempt and extortious threats to resign. That Sheriff Killeen then authorized and signed the "Special Investigations Disposition" form on July 28, 1999, wherein he did specificaliy "Initiate Termination Proceeding".

40. That as a consequence of the extortion attempts, capricious and malicious action, threats and false statements against Gibson to coerce her to surrender her employment, Gibson was required to seek medical attention with Dr. Stephen E. Spencer, who diagnosed her initially as having acute depression and situational distress from the trauma imposed upon her.

41. That Sheriff Killeen did acknowledge, in his Notice of Intent to Impose Discipline, dated August 2, 1999, that Gibson had signed eight (8) Ada County Pay Claim forms (vouchers) prepared by the Ada County Payroll Department, which had in fact incorrectly stated the employee salary, and did attempt, by said Notice of Intent to Impose Discipline upon Gibson, to transfer, promulgate and otherwise unreasonably and unlawfully reassign the record-keeping requirements and responsibilities to Gibson, all being a violation of the *Fair Labor Standards Act*, § 211 (c) and a clear admission thereof.

42. That on August 3, 1999, being one (1) day after serving Gibson Notice of Intent to Discipline, and seven (7)

days after Gibson refused to resign her Ada County employment, said Sheriff Killeen did authorize Detective Arville Glenn to send his "Case Status Report" to the Ada County Prosecutor's Office, therein and thereby falsely accusing Gibson of the alleged act of felony grand theft, an alleged violation of Idaho Code, § 18-2403, and did forward that report for the sole purpose of prosecution.

43. That on August 5, 1999, pursuant to the Sheriff's intent to request Gibson participation in an "informal" meeting with Ada County agents, Gibson's physician, Dr. Spencer, notified the Sheriff to the effect "her condition has not improved to the point where she can participate in a hearing until further notice" due to her medical trauma and diagnosed condition.

44. That on August 6, 1999, Gibson denied the allegations contained in Sheriff Killeen's Notice of Intent to Impose Discipline, pursuant to Ada County Code § 1-7G-3C, and did appeal the Sheriff's intention to terminate her employment, in accordance with the provisions in the Ada County Personnel System, Ada County Code § 1-7G-1 through § 1-7G-3, instituting what Gibson thought was a proceeding under the Idaho *Administrative Procedures Act*, and related to the *Fair Labor Standards Act*.

45. That as a result thereof, and on August 9, 1999, Greg H. Bower, Ada County Prosecutor, sent to Mr. John Christensen, Chief Criminal Prosecutor in Canyon County, Idaho, authorization "to file charges (against Gibson) in this case...", and therein stated "I will have you appointed as special prosecutor". That said communication was contrary to Idaho law and the statute governing such proceedings, and was designed solely to seek malicious prosecution, as such

conduct was not authorized by Idaho Code §31-2603 (a); that such letter of "authorization" was undertaken for the benefit of the Sheriff, designed to carry forward the threat of criminal charges to frighten said Gibson, constituting thereby an arbitrary, discriminatory and unlawful behavior, pursued solely for malicious and vengeful purposes.

46. That on August 11, 1999, the Sheriff's Legal Advisor submitted Gibson's July paycheck and claim form (pay voucher), which continued to show incorrect salary references of $1,550.00.

47. That on August 20, 1999, said Chief Criminal Deputy Canyon County Prosecutor, John Christensen, determined, as a matter of law, criminal charges against Gibson were "inappropriate", that notwithstanding said disposition, Ada County Prosecuting Attorney exercised further misconduct by submitting a letter of August 25, 1999, to the Sheriff's Budget Director, for entry of investigatory records, reports, and information of such classified nature, into Gibson's personnel file.

48. That on August 20, 1999, Dr. Spencer confirmed the diagnoses of acute depression, anxiety and insomnia from the result of the traumatic effects of the treatment Gibson had suffered by the wrongful actions of Ada County agents, and that diagnosis was made known to said Sheriff and his agents.

49. That pursuant to the inappropriate "informal" meeting again scheduled by the Sheriff's Legal Advisor for Gibson to meet with the Sheriff on August 23, 1999, at 3:00 p.m., Dr. Spencer was again requested to send another letter (August 20, 1999) stating "There is no way that she can adequately represent herself in the present emotional state."

50. That notwithstanding the medical diagnosis and state of emotional trauma caused by the unlawful conduct of Ada County officials, the County Sheriff Legal Advisor, on August 23, 1999, requested Gibson then accept Administrative Leave Without Pay; that Gibson's counsel declined that request, but pursuant to authority from Gibson and her husband, it was presented that if, Ada County would continue medical benefits coverage, during all periods of any administrative leave (needed for the acute depression, insomnia and anxiety attacks that had resulted from this psychological injury from the County's misconduct), Gibson would agree to accept status of Leave Without Pay, but only upon the continuation of all her medical benefits. In confirmation of such a proposal, Gibson caused a letter to be sent to confirm precisely what she would agree to, and identified the only status of non-pay she would accept, regarding Administrative Leave, in her effort to demonstrate her good faith duty of cooperation in her contractual employment relationship, and during all due process administrative proceedings and exercise of all protection, rights and remedies; that notwithstanding said letter and contrary to the Ad County employee policy, the Sheriff's Legal Advisor, acting on behalf of the Sheriff, disregarded the specific basis of acceptance and change in status, and placed Gibson on Administrative Leave Without Pay, and forthwith canceled all of her medical benefits. That such wrongful event was memorialized by letter of August 25, 1999, violating the policy, County Code, and express condition set forth by Gibson, constituting a violation of Ada County Code, § 1-7G-3, which therein has set forth the specific conditions upon which an employee can be placed on Administrative Leave Without Pay.

Appendix 73

51. That on August 25, 1999, Ada County personnel prepared a further Notice of Personnel Action, again showing Gibson's incorrect wages, and further stating "Employee to go on Administrative Leave WITHOUT Pay Effective 8/25/99 in lieu of pending investigation and decision following informal hearing with Sheriff Killeen."

52. That as a consequence of the extreme harmful and traumatic effects to the physical and emotional health of Gibson, caused directly by the actions of the Ada County Sheriff's Office and the Ada County Prosecutor's Office, Dr. Spencer prescribed further medications because of her inability to safely drive a vehicle, and consequently, her husband (and others) had to supervise most home activities, and Gibson had a power of attorney be prepared to appoint her husband to act in her stead, as Gibson was experiencing additional pain, physical and emotional injury.

53. That on September 1, 1999, the County sent a letter, along with what was labeled "Stacy Gibson's last check covering the period ending August 31, 1999." That said claim form (pay voucher) continued to show an incorrect pay rate and reference of $1,550.00.

54. That said act of Ada County to calculate, produce and forward the letter and check stating: "Stacy Gibson's last check covering the period ending August 31, 1999", prior to any hearing on the required element of good cause required by Ada County Code, to address any basis for termination, was a violation of the Ada County Code and further attempt to further violate Gibson's property rights.

55. That said Ada County officials and agents did then conspire, and take action to terminate Gibson's employment

with the Ada County Sheriff's Office, without the basis of any good cause, in violation of Gibson's property rights.

56. That on September 21, 1999, said Ada County, through R. Monte MacConnell, again presented the Sheriff's demand for an informal meeting with Gibson to occur on October 5, 1999, notwithstanding the fact said Killeen and MacConnell knew Gibson was under a physician's care, on medication, had given her power of attorney and her physician had forbidden Gibson to participate in all confrontational meetings due to her trauma and needed medical treatment, until further notice.

57. That on September 27, 1999, Gibson, through counsel, caused a letter to be sent to said MacConnell, again, asserting Gibson's rights under FLSA, the Ada County Code, applicable County Policy, and requested Ada County then provide a full and complete independent accounting of Gibson's payroll records, as the County's records were found to be froth with administrative accounting errors.

58. That on October 5, 1999, after Gibson had been threatened with malicious prosecution, and wrongfully placed on Administrative Leave Without Pay, the Sheriff regarded her to be a full status employee, and "ordered" Gibson to report to the County Jail Facility, at 1:00 p.m., to be diagnosed by the County Physician, Dr. Charles Steuart. That Gibson did as ordered, and in the company of her husband, did go to the Jail Facility as "ordered", did meet Dr. Steuart for that period of time as required, and was then paraded past other employees in the facility, and was compelled to undergo diagnosis by Dr. Steuart for his medical prognosis and determination of her mental and physical assessment; that Dr. Steuart confirmed the state of trauma as diagnosed by Dr.

Spencer, and informed the County she could not then participate in any confrontation settings.

59. That during that examination with Dr. Steuart, Gibson discovered her 'inbox' in the facility had been removed, and all indicia of her employment had been taken from the facility.

60. That in late October 1999, Gibson and her husband requested Dr. Steuart forward a copy of his diagnosis and prognosis made on October 5, 1999 to Gibson's primary physician, Dr. Stephen E. Spencer for review and for inclusion in her medical file; that Dr. Spencer and his nurse also requested those medical records be forwarded to his office by Dr. Steuart, at the authorization and request of said Gibson.

61. That on October 27, 1999, said MacConnell sent a letter stating he would not produce Dr. Steuart's medical records to Gibson or to Dr. Spencer as requested; that such action of said McConnell did constitute an interference with Dr. Steuart's professional conduct, and create a violation of the *Rule For Licensure To Practice Medicine And Surgery And Osteopathic Medicine And Surgery In Idaho*, IDAPA 22, Title 01, Chapter 01, and as such, a direct act of interference with Gibson's right to receive medical records, relating to her employment, and a direct interference with her rights and privileges associated with her employment.

62. That after said MacConnell refused to transfer Gibson's medical records to Dr. Spencer, said Gibson sent a certified letter to Dr. Steuart on October 29, 1999, requesting Dr. Steuart transfer her medical records to Dr. Spencer, just as he had before requested.

Appendix 73

63. That on November 3, 1999, said MacConnell sent a letter to again confirm Ada County had placed Gibson on "Administrative Leave without pay and without benefits", and refused to produce any medical records; that said MacConnell reiterated they would not send Dr. Spencer a copy of Dr. Steuart's medical notes and records, and then MacConnell undertook his controlling effort to keep Gibson from having any contact with all of her co-workers, including any friends she had at the Sheriff's Office.

64. That on November 8, 1999, Gibson's husband pursuant to his power of attorney, sent a further request to Dr. Steuart, again requesting Dr. Steuart forward copies of Gibson's medical records to her primary physician, Dr. Stephen E. Spencer.

65. That on November 12, 1999, Dr. Spencer sent a letter and again addressed the fact the continued obstructionism by the Ada County Sheriff's Office would perpetuate Gibson's insecurity, isolation, anxiety and depression, and make the situation impossible for her to appear at any informal meeting to discuss the matter in any confrontational setting, just as Dr. Steuart was concerned.

66. That on November 15, 1999, Gibson and her husband requested the assistance of the Idaho State Board of Medicine to direct Dr. Steuart comply and submit a copy of his October 5, 1999 examination records to Dr. Spencer; that said MacConnell advised the Medical Board no records exist.

67. That on December 14, 1999, Sheriff Killeen was again informed Gibson was still under the care and supervision of her physician, her condition had not improved, and the County would not be allowed to engage her in any

confrontational setting, and submitted physician verification of the nature and extent of her injuries in her continuing compliance with Ada County Code, § 1-7I-1F.

68. That on December 16th and 17th, 1999, it was confirmed Gibson was officially under surveillance by Sergeant Scott Johnson, with no lawful or legitimate purpose being served but solely in conjunction with this administrative overpayment error. That these actions of surveillance by Ada County were intended solely to frighten Gibson, as the Sheriff wanted to "encourage" her to resign, as the convenient resolution of their self-imposed dilemma, to avoid further emotional pressure. That such surveillance was designed to influence Gibson while she was still in a state of fragile health, and such conduct did constitute harassment, serving the only purpose to influence her to resign, and to achieve the County's directive to get Gibson to quit her job and avoid further formal disclosure of the administrative errors and poor choices being exercised by the County. That by such conduct, said Johnson violated Idaho Code, § 18-2604, as he intended to intimidate and harass Gibson, knowing Gibson was the subject of poor health, and only could have involvement in a civil proceeding, not any criminal proceeding; that Ada County Code, Sections 1-7A-2A and 1-7A-2B did prohibit such discrimination and harassment of an employee in any such form.

69. That on December 27, 1999, Sheriff Killeen decided to terminate Ms. Gibson, effective immediately.

70. That on January 4, 2000, Gibson denied any commission of any wrongful conduct or willful violation of the Ada County Personnel Code, or the Ada County Sheriff's Office Policy Manual, or any Idaho Code provision as contained within the statutes of the State of Idaho; that

Gibson appealed the decision of Sheriff Killeen's expressed intention to terminate her employment with the Ada County Sheriff's Office, and did seek appeal pursuant to the provisions of Ada County Code, § 1-7G-3L, as the appeal vehicle made available to her, and requested a hearing pursuant to all provisions contained in the Ada County Code.

71. That on January 4, 2000, Gibson gave notice pursuant to Idaho Code, § 45-606, § 45-607, § 45-609, and § 45-610, to Sheriff Killeen as to the wages, salary, overtime, and holiday pay she was entitled to be paid, as of the date of that notice. Within that notice, Gibson did assert her FLSA rights again, the violation thereof, and did notify Sheriff Killeen (again) her check for August 1999 was in error.

72. That on January 7, 2000, Ms. Kelli Ketlinski, acting as counsel for Ada County, sent correspondence, stating, in part, "If Ms. Gibson received a payroll warrant in either July or August 1999, which she believed did not match that which was due, she had an obligation and opportunity to bring that to her supervisor's attention at the time, and for five days following the date, she signed her voucher stating that the amount was correct." That Ada County refused to compensate Gibson for any of the wages, salary, overtime and holiday pay due her.

73. That in January 2000, Gibson, through Interrogatories and Request for Production of Documents, attempted to gain relevant and exculpatory evidence relating to her wrongful termination, and sought evidence relating to the wage and salary record-keeping, and how the Ada County Sheriff's Office and the Ada County Payroll Department had created and perpetuated their administrative errors that led to the issue of the erroneous overpayments.

Appendix 73

74. That on January 13, 2000, G. Lance Salladay, acting as an employee of Ada County, and in his salaried capacity as Ada County Personnel Hearing Officer, prevented Gibson any access to such information.

75. That said Ada County and its Sheriff's Office did continue in its efforts, and without any lawful basis or authority in their attempt to transfer unto Gibson, through the use of the "pay voucher" and "claim form", the employer's duty and statutory responsibility to keep and maintain accurate wage and salary records as their sole duty under 29 U.S.C., § 211 (c), and such ongoing action and conduct of said County officials, from July 20, 1999, throughout all durations of Gibson's right of employment, constitute violations of said federal statute, by virtue of Title 29, U.S.C., § 211 (c), and said actions, as alleged hereinabove, constitute repeated and independent violations of the *Fair Labor Standards Act*, § 215 (a) (3).

76. That Dr. Charles D. Steuart did notify the Idaho State Board of Medicine thereafter that he had destroyed all medical records from the examination he conducted on October 5, 1999, thereby committing a violation of the *Rule For Licensure To Practice Medicine And Surgery And Osteopathic Medicine And Surgery In Idaho*, IDAPA 22, Title 01, Chapter 01, being done as instructed by Ada County officials, constituting further violations of the *Fair Labor Standards Act*, § 215 (a) (3).

77. That on January 28, 2000, said MacConnell thereafter wrote the Idaho State Board of Medicine his letter, seeking to mitigate the violation of the Medical Rules, claiming, "there was no written product of the meeting" in an effort to protect Dr. Steuart from his own sincere and genuine honesty. That

said MacConnell further attempted to dissuade the Board of Medicine from investigating Gibson's complaint by his further remark "Her allegations are groundless and are for the most part figments of Mr. Gibson's over-active imagination", notwithstanding the fact the medical records had been confirmed destroyed by the physician who created them.

78. That on February 3, 2000, Dr. Stephen E. Spencer sent his letter to the Idaho State Board of Medicine, describing ongoing distortions of MacConnell as made in his letter of January 28, 2000, and did again address the requests he had made for copies of Dr. Steuart's medical records.

79. That on February 15, 2000, the County Hearing Officer, G. Lance Salladay, affirmed the termination of Gibson's employment with the Ada County Sheriff's Office.

80. That on February 18, 2000, Gibson did once again cause notice to Sheriff Killeen, requesting all wages, and pay due and owing, including "those periods of earnings which she was entitled due to the County's breach of agreement", be processed and forwarded, by Thursday, February 24, 2000.

81. That Gibson secured the services of Larry Stewart, Licensed Public Accountant, in an effort to again review all wage, salary and pay records made available, and confirmed record-keeping discrepancies in all aspects of wages, salaries, benefits and compensation, from what was reported on the W-2 Forms, compared to pay vouchers, records and pay documents.

82. That on February 1, 2000, the Ada County Payroll Department correcting one of their errors concerning the erroneous salary of $1,550.00, and did thereafter indicate the correct salary was to have been $1,575.00. That on March 1,

2000, Sheriff Killeen authorized Ada County Payroll Department to pay Gibson $25.00 for each of those months the County was required to pay her that promotional pay, pursuant to Ada County Code, § 1-7C-5A.

83. That on February 15, 2000, the Ada County Payroll Department created a erroneous "pay voucher" and Notice of Personnel Action, therein detailing the following remarks:

> SEPARATION: Involuntary Resignation Effective 2/15/00
>
> 117.8 – Comp Hours Due
> 168. Vacation Hours Due
> -0- Overtime Hours Due
> -0- Holiday Hours Due

That this Notice and "pay voucher" was authorized by Sheriff Killeen on March 1, 2000, and Gibson was required to again dispute the Ada County Payroll Department's record-keeping efforts, as the above-referenced comp hours, vacation hours, overtime hours, and holiday hours and described event of separation, were in all respects in error. That each, every and all of these record-keeping errors constitute a violation of the *Fair Labor Standards Act*, § 211 (c), as a matter of law.

84. That as further indication of record-keeping errors, Gibson was mailed a "Cobra Notification", dated March 2, 2000, therein notifying Gibson to the effect her health coverage was now ending, due to "Termination of the employee's employment (other than gross misconduct) or reduction of hours worked which renders the employee ineligible for coverage." That such document further stated Gibson's "coverage will terminate on February 29, 2000"; that Gibson

was specifically told beginning August 25, 1999, that her benefits had been cancelled, and she had no benefits coverage after September 1999, and her efforts to utilize her medical benefits after September 1999 were declined.

85. That Ada County, as an FLSA employer, has subsequently admitted it has been out of compliance with the mandatory obligations to comply with the provisions and conditions of FLSA, as declared February 12, 2001 by Theodore E. Argyle, Ada County Chief Deputy Attorney, Civil Division, to Ada County Board of Commissioners, and such non-compliance spanned the entire duration of Gibson's employment, and was the proximate and sole cause of the deposits of overpayments into Gibson's joint checking account.

86. That on August 1, 2001, said MacConnell, in response to a Work Comp claim filed by Gibson, caused a letter to be sent to Mike Roberts, Ada County Risk Manager, wherein MacConnell said Gibson's Work Comp claim was "spurious".

87. That on August 2, 2001, said MacConnell continued his retaliation against Gibson, solely because she asserted her employment rights throughout this ordeal of enduring these ongoing administrative errors and refused to submit her resignation, as he demanded of her.

88. That on January 8, 2002, Sheriff Killeen officially announced pay voucher errors, and prepared a Payroll Update Memorandum for all employees of the Ada County Sheriff's Office, stating "Your normal benefit time (vacation, sick and holiday) and your compensatory time will print out with your check, but it will not be accurate."

89. That Ada County Commissioner, Sharon M. Ullman, officially announced Ada County has not been in compliance with the mandatory provisions and conditions of FLSA, and has issued her sworn statement to that effect.

90. On May 18, 2001, Ada County employees, because of this non-compliance, did attend a Risk Training seminar concerning the *Fair Labor Standards Act*; that it was deemed necessary to educate Ada County officials about FLSA obligations and responsibilities to County employees, as an FLSA employer. That during that seminar, it was disclosed Ada County had been *out-of-compliance* with the applicable Federal law, and each County Department needed to initiate major changes in the ~~method~~ and means by which the County would handle, process, and maintain employees' wage records, and discharge its record keeping responsibilities, and maintain records for *correct disbursements*. That official County Records indicate the Board of County Commissioners made such strident changes, effective not later than January 10, 2002. That during that seminar, it was specifically emphasized no defense was available to them for an FLSA violation, and stressed need ~~for~~ all Departments to come into compliance with the *Fair Labor Standards Act*.

91. That on October 17, 2001, Jesse Betancourt, Wage and Hour Investigator, U.S. Department of Labor, held a final conference with the Ada County Juvenile Court Services concerning his ongoing investigation about that Department's violations of § 7 (k) and § 211 of the *Fair Labor Standards Act* as a result of their employee exercising his protected rights. That said investigation did conclude Ada County had been and was in violation of the mandatory record-keeping and overtime payment provisions under FLSA.

Appendix 73

COUNT I

CLAIM FOR WAGES DUE GIBSON PRIOR TO JULY 20, 1999

92. Gibson does re-allege each of the General Allegations set forth and contained in Paragraphs 1 through 91 above, inclusive, as though said allegations were set forth and contained in full herein.

93. That effective July 1, 1998, and at all times thereafter relevant to this Claim for wages, to July 20, 1999, Gibson was classified as a permanent status employee, with vested rights as accrued under her tenured status, and entitlements and protections afforded under the *Fair Labor Standards Act* (FLSA), Title 29 U.S.C., § 201 *et seq.*, as carried into the provisions and enforced under the Ada County Code, County Personnel System, § 1-7C-1 through § 1-7C-10, Ada County Code.

94. That as early as December 23, 1997, the Ada County Sheriff's Office was aware it could not, pursuant to federal law, pay overtime compensation to Ada County Sheriff's Office civilian personnel (non "law enforcement" personnel or "white shirts") using the "*7k exemption*" under FLSA, and to do so was a wage pay error.

95. That since Gibson's promotional transfer to the Ada County Jail Facility on October 16, 1998, Ada County Payroll Department, concerning the payment of wages to Sheriff's Office employees referred to as "white shirts", has misapplied the FLSA "*7k exemption*" to those civilian employees of the Ada County Jail Facility; that said "*7k exemption*" was available only for paying overtime compensation due "law

enforcement" personnel, affirmatively defined to mean "employees who are empowered by state or local ordinance to enforce laws designed to maintain peace and order, protect life and property, and to prevent and detect crimes; such employees only who have the power to arrest; and who have undergone training in law enforcement". That pursuant to the United States *Code of Federal Regulations*, Title 29, § 553.211 through § 553.212, at no time did Gibson meet this statutory criteria as "law enforcement" personnel, well known to said employer, as she did not have the power to arrest (she was a non-commissioned deputy, she was not a candidate for the Post Academy, nor was she eligible to receive retirement benefits pursuant to "Rule 80", under the Public Employees Retirement System of Idaho (PERSI). That "Rule 80" was available only to "law enforcement" personnel. That at all relevant times, Ada County was required to compensate Gibson's overtime under § 207 (a)(1), FLSA, not § 207 (k); that § 207 (a) (1) requires all work time in excess of forty (40) hours per week to be compensated "at a rate not less than one and one-half times the regular rate at which an employee is employed." That Gibson does allege, and as a matter of law, such action was a violation of the *Fair Labor Standards Act*, § 215 (2), as it is "unlawful for any person to violate any of the provisions of §206 or § 207..."

96. That Gibson is entitled to receive all overtime compensation due her from October 16, 1998, through July 20, 1999, as a result of this misapplication of the "*7k exemption*" to her overtime compensation; that Gibson has not received her compensation therefore, and is yet to be compensated under § 207 (a)(1), not § 207 (k), for all work time in excess of forty (40) hours per week "at a rate not less than one and one-half times the regular rate at which an employee is employed."

Appendix 73

97. That Gibson is entitled to be paid for each of the 112 required reporting periods of minutes each prior to the start of each of her regular work shifts, utilized by her employer for jail briefing; that Gibson under the supervision, direction and control of the County at those times and on the employer's premises as directed. This claim exists as a result of the misapplication of the FLSA "*7k exemption*" used wrongfully to calculate overtime wages; that Gibson has not received compensation therefore, and is yet entitled to be compensated, under § 207 (a)(1), not § 207 (k).

98. That Gibson does claim compensation due her in accordance with the reconstructed monthly calendars for October 1998, through July 1999, for which Gibson hs determined her straight (regular) time and her overtime compensation from October 16, 1998 through July 20, 1999, to be in the following amounts:

Time Period	Regular Time Due (Jail Briefing)	Accumulated Overtime Due
10/18/98-10/24/98	0.75 Hours	0 Hours
10/25/98-10/31/98	0 Hour	9 Hours
11/1/98-11/7/98	0.75 Hours	0 Hours
11/8/98-11/14/98	0.75 Hours	0 Hours
11/15/98-11/21/98	0.50 Hours	0 Hours
11/22/98-11/28/98	0.75 Hours	0 Hours
11/29/98-12/5/98	0 Hours	9 Hours
12/6/98-12/12/98	0 Hours	9 Hours
12/13/98-12/19/98	0.25 Hours	0 Hours
12/20/98-12/26/98	0.75 Hours	0 Hours
12/26/98-1/2/99	0 Hours	9 Hours
1/3/99-1/9/99	0 Hours	9 Hours
1/10/99-1/16/99	0 Hours	9 Hours

Appendix 73

1/17/99-1/23/99	0 Hours	9 Hours
1/24/99-1/30/99	0.75 Hours	0 Hours
1/31/99-2/6/99	0.75 Hours	0 Hours
2/7/99-2/13/99	0.50 Hours	0 Hours
2/14/99-2/20/99	0.75 Hours	0 Hours
2/21/99-2/27/99	0 Hours	9 Hours
2/28/99-3/6/99	0.25 Hours	0 Hours
3/7/99-3/13/99	0 Hours	0 Hours
3/14/99-3/20/99	0 Hours	9 Hours
3/21/99-3/27/99	0.75 Hours	0 Hours
3/28/99-4/3/99	0.75 Hours	0 Hours
4/4/99-4/10/99	0.75 Hours	0 Hours
4/11/99-4/17/99	0.25 Hours	0 Hours
4/18/99-4/24/99	0.75 Hours	0 Hours
4/25/99-5/1/99	0.75 Hours	0 Hours
5/2/99-5/8/99	0 Hours	9 Hours
5/9/99-5/15/99	0 Hours	9 Hours
5/16/99-5/22/99	0.75 Hours	0 Hours
5/23/99-5/29/99	0.25 Hours	0 Hours
5/30/99-6/5/99	0.25 Hours	0 Hours
6/6/99-6/12/99	0.75 Hours	0 Hours
6/13/99-6/19/99	0.75 Hours	0 Hours
6/20/99-6/26/99	0 Hours	9 Hours
6/27/99-7/3/99	0 Hours	9 Hours
7/4/99-7/10/99	0 Hours	9 Hours
Total	**14.25 Hours** (Regular Hourly Rate)	**126 Hours** (1 ½ Times Regular Rate)

99. That Gibson is entitled to be paid for a specific twelve (12) hour overtime shift performed at the BSU Substation on June 28, 1999, for which Gibson has not received compensation therefore, and is yet to be compensated pursuant

to the provisions of FLSA and the provisions of the Ada County Sheriff's Office Policy Manual, § 4.01.

100. That Gibson is entitled to be paid for another specific period of twelve (12) hours of regular pay for the July 4, 1999 Holiday, for which Gibson has not received compensation therefore, and is yet to be compensated pursuant to the provisions of FLSA and the provisions of the Ada County Sheriff's Office Policy Manual, § 4.01.

COUNT II

CLAIM FOR WAGES DUE GIBSON FOR OVERTIME PAY FOR JULY 20, 1999

101. Gibson does re-allege each of the Allegations set forth and contained in Paragraphs 1 through 100 above, inclusive, as though said allegations were set forth and contained in full herein.

102. That all times relevant to this claim for compensable time through her employment, said Gibson, notwithstanding her medical leave status was summoned to report to the Ada County Sheriff's Office on July 20, 1999; that Gibson was classified as a permanent status employee, with vested rights as accrued under her tenured status, and entitlements and protections afforded under the *Fair Labor Standards Act* (FLSA), Title 29 U.S.C. § 201 *et seq.*, as carried into the provisions and enforced under their County Personnel System, § 1-7C-1 through § 1-7C-10, Ada County Code, all of which were in effect when she was ordered to report to the Sheriff's Office on July 20, 1999.

103. That Gibson is entitled to compensation for that period of time she was under interrogation on July 20, 1999, when summoned to the Sheriff's Office while on medical leave, in the amount of two and one-half (2 ½) hours of overtime pay for which Gibson has not received compensation therefore, and is yet entitled to be compensated overtime pursuant to the provisions of FLSA and the Ada County Sheriff's Office Policy Manual, § 4.01 (1), (3) and § 7.05 (2).

COUNT III

CLAIM FOR WAGES DUE GIBSON FROM AUGUST 24, 1999 THROUGH SEPTEMBER 30, 1999

104. Gibson does re-allege each of the Allegations set forth and contained in Paragraphs 1 through 103 above, inclusive, as though said allegations were set forth and contained in full herein.

105. That at all times relevant to this claim for compensable time through her salaried employment for the period of August 24, 1998, through September 30, 1999, said Gibson was classified as a permanent status employee, with vested rights as accrued under her tenured status, and entitlements and protections afforded under the *Fair Labor Standards Act* (FLSA), Title 29 U.S.C., § 201 *et seq.*, as carried into the provisions and enforced under their County Personnel System, § 1-7C-1 through § 1-7C-10, Ada County Code.

106. That on August 24, 1999, the Ada County Sheriff's Legal Advisor, R. Monte MacConnell, acting for and on behalf of the Sheriff, did place Gibson on declared Administrative

Leave, Without Pay, and canceled Gibson's medical benefits forthwith, in violation of Ada County Code, § 1-7G-3, which provisions therein were uniquely specific to when an employee can be placed on unpaid Leave. That Gibson does allege, as a matter of law, that action was a violation of the *Fair Labor Standards Act*, § 215 (a) (3); that said declarations were unlawful and all affected periods of Gibson's continuous employment and all wages are due and payable during that administrative leave for which Gibson is entitled to Leave with pay.

107. That confirmation of the County's determination of such unpaid Leave was disclosed by letter of August 25, 1999. That Gibson does allege, as a matter of law, this further written confirmation of unlawful declared leave was a further violation of Ada County Code, § 1-7G-3, which provisions therein were uniquely specific as to when an employee can be placed on unpaid Leave. That Gibson does also allege, as a matter of law, this further action by said MacConnell in behalf of Ada County, was a violation of the *Fair Labor Standards Act*, § 215 (a) (3); that said declarations were unlawful and all affected periods of Gibson's wages during that administrative leave must be declared to be Leave with pay.

108. That as a result of said acts and resulting violations and disregard for the expressed concerns regarding the Code on such leave status, Gibson did accrue salary and benefits thereon as a result of said wrongful action, from August 24, 1999 through September 30, 1999, as follows:

Time Period	Wages Due
8/24/99-8/31/99	$ 358.00 ($1,575.00-$25.00-$1,192.00)
9/1/99-9/30/99	$1,575.00

109. That as a result of this wrongful entry of Administrative Leave Without Pay, Gibson ~~is~~ entitled to said wages for which Gibson has not received that compensation due her, and is entitled to be compensated those wages for regular pay and routine overtime and holiday pay, pursuant to the provisions of FLSA.

COUNT IV

CLAIM FOR WAGES DUE GIBSON FROM OCTOBER 1, 1999 THROUGH FEBRUARY 15, 2000

110. Gibson does re-allege each of the Allegations set forth and contained in Paragraphs 1 through 109 above, inclusive, as though said allegations were set forth and contained in full herein.

111. That at all times relevant to this claim for compensable time through her employment for the period of October 1, 1999, through February 15, 2000, said Gibson was classified as a permanent status employee, with vested rights as accrued under her tenured status, and entitlements and protections afforded under the *Fair Labor Standards Act* (FLSA), Title 29 U.S.C., § 201 *et seq.*, as carried into the provisions and enforced under their County Personnel System, § 1-7C-1 through § 1-7C-10, Ada County Code.

112. That on August 24, 1999, the Ada County Sheriff's Legal Advisor, R. Monte MacConnell, acting for and on behalf of the Sheriff and Ada County, did place Gibson on declared Administrative Leave, Without Pay, and canceled Gibson's medical benefits forthwith, in violation of Ada County Code, § 1-7G-3, which provision therein was uniquely specific to when

an employee can be placed on unpaid Leave. That Gibson does allege, as a matter of law, this action was also a violation of the *Fair Labor Standards Act*, § 215 (a) (3); that said declarations were unlawful and all affected periods of Gibson's wages during that declared administrative leave must be deemed to be Leave with pay.

113. That confirmation of the County's determination of such unpaid Leave was disclosed by letter of August 25, 1999. That Gibson does allege, as a matter of law, this further written confirmation of unlawful declared leave was a violation of the Ada County Code, § 1-7G-3, which provision therein was uniquely specific to when an employee can be placed on unpaid Leave. That Gibson does also allege, as a matter of law, this further action by said MacConnell, in behalf of Ada County, was a violation of the *Fair Labor Standards Act*, § 215 (a) (3); that said declarations were unlawful and all affected periods of Gibson's wages during that administrative leave must be declared to be Leave with pay.

114. That effective October 1, 1999, Gibson had fully completed her "intradepartmental promotional probation" period as defined by Ada County Code, § 1-7E-1B (2), thereby entitling Gibson to her periodic step-increase in wages, pursuant to the Sheriff's Pay Plan, to $1,700.00.

115. That as a result of said acts and resulting violations and disregard for the expressed concerns of such leave status, Gibson did accrue wages and benefits thereon, from October 1, 1999, through February 15, 2000, as follows:

Time Period	Wages Due
10/1/99-10/31/99	$1,700.00

11/1/99-11/31/99	$1,700.00
12/1/99-12/31/99	$1,700.00
1/1/00-1/31/00	$1,700.00
2/1/00-2/15/00	$ 850.00

116. That as a result of this wrongful entry of Administrative Leave Without Pay, Gibson is entitled to said wages for which Gibson has not received that compensation due her, and is entitled to be compensated those wages for regular pay and routine overtime and holiday pay, pursuant to the provisions of FLSA, and said leave be declared to be with pay.

COUNT V

CLAIM FOR SICK LEAVE, VACATION PAY, HOLIDAY PAY AND OVERTIME PAY, STEP INCREASES, COST OF LIVING INCREASES, MEDICAL INSURANCE BENEFITS, FAMILY COVERAGE BENEFITS, LIFE AND DISABILITY INSURANCE, WORKMAN'S COMPENSATION COVERAGE, ALL RETIREMENT BENEFIT FUNDS FOR PERSI AND PEBSCO, TOGETHER WITH TRAINING BENEFITS AND UNPAID BENEFITS FROM JULY 20, 1999 THROUGH FEBRUARY 15, 2000.

117. Gibson does re-allege each of the Allegations set forth and contained in Paragraphs 1 through 116 above, inclusive, as though said allegations were set forth and contained in full herein.

118. That at all times relevant to this Claim for sick leave, vacation pay, overtime pay, pay increases (step increases), cost of living increases, medical benefits, family coverage benefits,

life and disability insurance, Workman's Compensation coverage, unpaid benefits and all other benefits to which Gibson was entitled to receive for compensable time from July 20, 1999 through February 15, 2000, said Gibson was classified as a permanent status employee, with vested rights as accrued under her tenured status, with entitlements, benefits and protection afforded under the *Fair Labor Standards Act* (FLSA), Title 29 U.S.C. § 201 *et seq.*, as carried into the provisions and enforced under their County Personnel System, § 1-7C-1 through § 1-7C-10, Ada County Code.

119. That all wages and earnings identified in COUNTS I, II, III and IV above, did accrue various classifications of compensation, entitlements, and benefits, in accordance with Gibson's classified status as a permanent employee, including sick leave, vacation pay, additional holiday pay, additional overtime pay, step increases, cost of living increases, continued medical insurance benefits, continued family coverage benefits, continued life and disability insurance, Workman's Compensation coverage, all retirement benefit funds for PERSI (representing 6% of total monthly wages) and PEBSCO (an employee contributory retirement plan), together with available training benefits.

120. That Gibson is entitled to said additional compensation, entitlements and benefits for which Gibson has not received compensation due her, and is entitled to be compensated for the value thereof, as determined upon the facts and merits of this Claim. That Gibson does allege, as a matter of law, this action in denying all such entitlements, benefits and compensation was a violation of the *Fair Labor Standards Act*, § 215 (a) (3), and all benefits, entitlements and compensation must be paid as due her.

Appendix 73

COUNT VI

ALTERNATIVE CAUSE OF ACTION REGARDING GIBSON'S MEDICAL COVERAGE BENEFITS FROM AUGUST 24, 1999 THROUGH FEBRUARY 15, 2000

121. Gibson does re-allege each of the Allegations set forth and contained in Paragraphs 1 through 120 above, inclusive, as though said allegations were set forth and contained in full herein.

122. That during discussions on August 23, 1999 between the Sheriff's Legal Advisor, R. Monte MacConnell, and counsel for Gibson, said County requested Gibson to accept Administrative Leave Without Pay, and in response thereto Gibson declined that request, but did agree that as long as Ada County would continue Gibson's medical benefits coverage, without interruption, during any period of Administrative Leave, Gibson would cooperate with any investigation and consent to such Leave status. The assurance of continuing benefit coverage was critical to and a material element to Gibson's decision, as her health was in jeopardy as she suffered as the result of the treatment sustained by the Ada County agents and County personnel on July 20, 1999. That Gibson does allege, as a matter of law, this requested action of leave by said County agent was a violation of the *Fair Labor Standards Act*, § 215 (a) (3), and the request was unlawful by virtue of both State, Federal and County law.

123. That Gibson caused a letter to be sent to Ada County to confirm the only basis upon which Gibson would agree to cooperate, in good faith with Ada County, and endure a status of non-pay on Administrative Leave, and requiring assurance of uninterrupted continuation of her medical coverage benefits.

124. That notwithstanding Gibson's cooperation with such an extended offer, the Legal Advisor, R. Monte MacConnell, acting for and on behalf of Ada County and its Sheriff, disregarded, declined and ignored Gibson's letter, and did immediately place Gibson on Administrative Leave Without Pay, and did immediately cancel Gibson's medical coverage benefits entirely, as reflected in the County's letter of August 25, 1999. That Gibson does allege, as a matter of law, this action, by the placement of Gibson upon Administrative Leave Without Pay and the cancellation of her medical benefits, was in violation of any basis upon which Gibson could consider any aspect of Leave, and the action taken by the County did constitute a violation of Ada County Code, § 1-7G-3, which provision therein is uniquely specific when an employee can be placed on unpaid Leave. That Gibson does allege, as a matter of law, this action was also a violation of the *Fair Labor Standards Act*, § 215 (a) (3).

125. That Gibson is entitled to recover all benefits, coverage, costs, damages and losses suffered as a result of the cancellation of the medical benefits coverage, which damages are asserted as an alternative Claim to recovery of compensation identified in COUNT V above.

COUNT VII

CLAIM AGAINST ADA COUNTY FOR THEIR MALICIOUS AND CAPRICIOUS MANNER IN WHICH THEY "ORDERED" GIBSON TO SEE THE COUNTY CONTRACTED PHYSICIAN, STRIPPED HER OF ALL INDICIA OF EMPLOYMENT, AND REQUIRED THE PHYSICIAN TO DESTROY ALL DOCUMENTATION OF HIS DIAGNOSIS AND PROGNOSIS

126. Gibson does re-allege each of the Allegations set forth and contained in Paragraphs 1 through 125 above, inclusive, as though said allegations were set forth and contained in full herein.

127. On October 5, 1999, Mr. MacConnell contacted Gibson's counsel, told him the Sheriff was now "ordering" Gibson to report to the County Jail Facility, at 1:00 p.m., to be diagnosed by County Physician, Dr. Charles Steuart. Gibson was then at her appointment with Dr. Spencer when said command was received and communicated by her counsel. At 1:00 p.m., Gibson did, while accompanied by her husband, go to the Jail Facility as "ordered", and met Dr. Steuart. Gibson was paraded past other employees in the Jail before Dr. Steuart examined her, at which time Gibson's husband told Dr. Steuart to call Dr. Spencer to confirm what had already been diagnosed. Dr. Steuart said he would not do that, and underwent his own diagnosis, and generated notes addressing his diagnosis and prognosis of Gibson. That Gibson does allege, as a matter of law, this form of action was a violation of the *Fair Labor Standards Act*, § 215 (a) (3).

128. That upon completion of Dr. Steuart's examination, Gibson approached Lieutenant Dale Woodcook, then standing in the hallway, and requested she be allowed to remove personal property from her 'inbox' located in the mailroom. It was discovered Gibson's 'inbox' had been removed, and all indicia of her employment had been removed. That Gibson does allege, as a matter of law, this action of removing her 'inbox', while still an employee, was a violation of the *Fair Labor Standards Act*, § 215 (a) (3).

129. That request was made ~~by~~ Gibson~~,~~ ~~by~~ her husband, by use of his Power of Attorney, by Dr. Spencer's nurse,

Kristin Carle, and by Dr. Spencer for a copy of the medical records; that Ada County refused to deliver a copy of the notes (patient medical records) generated by Dr. Steuart during his medical examination; that Mr. MacConnell thereafter identified his participation in this process of withholding Gibson's medical records by his November 3, 1999 letter to Gibson's counsel. That Ada County continued to violate Gibson's rights and privileges envisioned by IDAPA 22.01.01, and on November 15, 1999, with the assistance of her husband, said Gibson filed a complaint against Dr. Steuart with the Idaho State Board of Medicine. The Board of Medicine confirmed the involvement of Dr. Steuart and Mr. MacConnell concerning the destruction of Gibson's medical records. That Gibson does allege, as a matter of law, this course of action was a violation of the *Fair Labor Standards Act*, § 215 (a) (3).

130. That by this time, Ada County had declared Gibson's termination, without personal presence of Gibson at a hearing; that Ada County knew Gibson had suffered a critical health condition and impairment due to their conduct; the County knew Gibson was under medical care of Dr. Spencer, and could not participate in confrontational proceedings without experiencing relapse; the County knew Gibson had been continuously under doctor's supervision, on medicine and under medical care; that the County knew Gibson had been examined by Dr. Charles Steuart on October 5th, because they claimed she was still employed, yet, all indicia of her employment had been removed from her work environment, and the Notice of Intent to Terminate had been issued July 26th; that Ada County had already attempted to encourage Canyon County to maliciously prosecute Gibson, under the "color of authorization", because Gibson would not resign; that Ada County had in fact formulated Gibson's W-2 wage form for

processing her termination, yet was aware from Dr. Steuart's diagnosis that Gibson could not participate in any pre-termination confrontational setting, and because of that knowledge, directed the destruction of Dr. Steuart's medical documentation; that Gibson does allege, a matter of law, that all of this action was a violation of the *Fair Labor Standards Act*, § 215 (a) (3).

COUNT VIII

CLAIM FOR WAGES DUE GIBSON FOR OVERTIME PAY FOR OCTOBER 5, 1999

131. Gibson does re-allege each of the Allegations set forth and contained in Paragraphs 1 through 130 above, inclusive, as though said allegations were set forth and contained in full herein.

132. That all times relevant to this claim for compensable time through her employment, said Gibson, notwithstanding her medical leave status, was summoned to report to the Ada County Sheriff's Office Medical Facility on October 5, 1999; that Gibson was classified as a permanent status employee, with vested rights as accrued under her tenured status, and entitlements and protections afforded under the *Fair Labor Standards Act* (FLSA), Title 29 U.S.C. § 201 *et seq.*, as carried into the provisions and enforced under their County Personnel System, § 1-7C-1 through § 1-7C-10, Ada County Code, and did report to the facility as ordered by Ada County.

133. That Gibson is entitled to compensation for that period of time she was being examined by Dr. Charles Steuart on October 5, 1999, as she was "ordered" to the Sheriff's Office and entitled to pay for two (2) hours of overtime pay

pursuant to the provisions of FLSA and the Ada County Sheriff's Office Policy Manual, § 4.01 (1), (3) and § 7.05 (2).

COUNT IX

CLAIM AGAINST ADA COUNTY FOR REPEATED ATTEMPTS TO ENGAGE A CONFRONTATIONAL MEETING; FAILURE TO SUBMIT NOTICE OF GIBSON'S WORK RELATED INJURY TO THE IDAHO INDUSTRIAL COMMISSION, WITHIN TEN (10) DAYS AFTER OCCURRENCE OF THE INJURY, AND FAILURE TO SUBMIT GIBSON'S WORKER'S COMPENSATION CLAIM AS REPEATEDLY REQUESTED BY GIBSON'S COUNSEL

134. Gibson does re-allege each of the Allegations set forth and contained in Paragraphs 1 through 133 above, inclusive, as though said allegations were set forth and contained in full herein.

135. That damage was done to Gibson's physical, emotional and mental health as caused by the false, discriminatory, capricious and malicious accusations of Ada County, its Sheriff and his Office officials, and from the contentions and misconduct of their Legal Advisor, R. Monte MacConnell; that Ada County Sheriff, Vaughn Killeen, and said MacConnell continued to engage in repeated attempts of confrontational meetings with Gibson, against the advise of her physician, Dr. Stephen Spencer, and even contrary to the diagnosis of Dr. Steuart; thereby causing additional stress and emotional disruption. That Gibson does allege, as a matter of law, these ongoing actions were violations of the *Fair Labor Standards Act*, § 215 (a) (3).

136. That Gibson did request benefits, and gave notice of intent to seek all available benefits, during repeated phone contact with County benefit personnel, as Gibson needed assistance for the incurred medical expenses being incurred after the July 20, 1999 interrogations. That Gibson spoke to the individuals with the County Personnel Department, and filed her claim form for short-term disability benefits under her medical coverage, and expressed need to have a Work Comp claim filed along with that claim. Said Gibson engaged in several conversations with the personnel, received various statements about what benefits could or would apply, and as they were wanting to identify a "physical accident", Gibson explained it was a medical problem from the emotional trauma from the work environment, occurring on July 20, 1999; that the focus was shifted by Ada County from that Work Comp to medical policy coverage, as they said there was County concern as to an "identifiable accident"; that after shifting focus, it was then determined coverage on the short-term disability benefits applied only to non-work related events, and Gibson again requested a Work Comp claim be filed and reported as a result of the traumatic injuries resulting on July 20, 1999. The objective of Ada County was then focused to avoid any available form of obligation or expense to the County. That all medical needs and resulting expenses were all the result of work environment trauma, and were the proper subject of Workman's Compensation. That Gibson referred to the accident of July 20, 1999, and understood her discussion was to establish her right to and declare her intent to seek benefits; that Gibson was told her right thereto would then be processed, but was told they were not sure what coverage would be provided under the Work Comp policy. Nothing thereafter was forthcoming, so Gibson's counsel thereafter (from July 22, 1999 through December 24, 1999) made several requests to R. Monte MacConnell, Legal Advisor to the Ada

County Sheriff, to undertake the needed effort to submit a Workman's Compensation Claim for Gibson's benefit, as well as to process her claim for short-term disability.

137. That the physical and emotional state of Gibson's situation brought about the need for Gibson's counsel to make repeated attempts to Mr. MacConnell to have the Ada County Sheriff's Office submit this incident to the Idaho Industrial Commission as a Worker's Compensation Claim, yet Ada County failed to file any claim, nor did Ada County give notice of the work related accident, as required by state statute under Idaho Code, § 72-601 *et seq.* That Gibson does allege, as a matter of law, this withheld action was a violation of the *Fair Labor Standards Act*, § 215 (a) (3), and § 72-601 *et seq.*, Idaho Code.

COUNT X

CLAIM AGAINST ADA COUNTY FOR OBSTRUCTING JUSTICE WHEN DETECTIVE ARVILLE GLENN, ACTING IN BEHALF OF ADA COUNTY, FALSELY TESTIFIED BEFORE THE ADA COUNTY HEARING OFFICER ON JANUARY 25, 2000

138. Gibson does re-allege each of the Allegations set forth and contained in Paragraphs 1 through 137 above, inclusive, as though said allegations were set forth and contained in full herein.

139. That all times relevant to this claim for compensable time through her employment, and notwithstanding Gibson's medical leave status and being placed on forced administrative leave without pay, said Gibson was summoned to report to a hearing with the Ada County Hearing Officer on January 24th

and 25th, 2000, and participate in that hearing process, Gibson was classified as a permanent status employee, with vested rights as accrued under her tenured status, and entitlements and protections afforded under the *Fair Labor Standards Act* (FLSA), Title 29 U.S.C. § 201 *et seq.*, as carried into the provisions and enforced under their County Personnel System, § 1-7C-1 through § 1-7C-10, Ada County Code.

140. That on July 20, 1999, Detective Arville Glenn, Ada County Sheriff's Office, did directly and falsely accuse Gibson of collaborating or conspiring with another person to cause the administrative payroll error, and then to get overpaid, and then keep Ada County's money, as he told Gibson the following:

> "Well, I just want you to understand that I think what happened was that you developed some plan, whether it was by yourself or if you were doing it with someone else to be ready for this day, to be ready for this day."

141. That thereafter, on January 25, 2000, during said hearing, Detective Glenn testified before the Ada County Personnel Hearing Officer, G. Lance Salladay, and claimed he had not accused Gibson of collaborating with anyone and stated:

> "Did she purposely cause it to be increased? No, I never…

142. That Gibson does allege, as a matter of law, this contradictory statement under oath and recanting such accusations and earlier conduct, was a continuing violation of the *Fair Labor Standards Act*, § 215 (a) (3), and a violation of

Idaho Code, § 18-5401, as said Glenn at all times was attempting to jeopardize Gibson's property right of employment, and shield the County from liability for his misconduct.

COUNT XI

CLAIM AGAINST ADA COUNTY FOR REPEATED VIOLATIONS OF GIBSON'S RIGHTS PURSUANT TO *THE FAIR LABOR STANDARDS ACT.* 29 U.S.C., § 201 *ET SEQ.* AS THE COUNTY KNEW THEY WERE IN VIOLATION, AND HAD BEEN IN VIOLATION OF THE ACT SINCE 1994

143. Gibson does re-allege each of the Allegations set forth and contained in Paragraphs 1 through 142 above, inclusive, as though said allegations were set forth and contained in full herein.

144. That at all times relevant to this claim for wages through her employment for the periods of October 1, 1999, through February 15, 2000, said Gibson was classified as a permanent status employee, with vested rights as accrued under her tenured status, and entitlements and protections afforded under the *Fair Labor Standards Act* (FLSA), Title 29 U.S.C., § 201 *et seq.*, as carried into the provisions and enforced under their County Personnel System, § 1-7C-1 through § 1-7C-10, Ada County Code.

145. That Ada County, its Sheriff's Office and its Payroll Department violated several federal and state statutes during their mistreatment of Gibson; Ada County, its Sheriff's Office and its Payroll Department had prior knowledge of violations (See Ken Woodbridge and Bob Perkins v County of Ada, Case

No. 95957, Fourth District Court, Ada County, Honorable G.D. Carey, presiding), of the *Fair Labor Standards Act* over pay records, pay vouchers and restrictive endorsements; that Ada County specifically violated Title 29 U.S.C., § 211 (c) (record-keeping), and § 215 (3) (retaliatory discharge) due to overpayments caused from their own payroll system errors in the record keeping process.

146. That said Ada County Sheriff, Vaughn Killeen, has historically expressed an arrogant attitude when dealing with employees' concerns over pay issues controlled by FLSA, and was quoted in the Proposed Findings of Fact, Conclusions of Law and Order in the Woodbridge-Perkins Case, No. 95957, *supra*, (P5, L16-17), as stating: "I don't give a shit what the Ada County Ordinance says."

147. That Gibson does allege, as a matter of law, that this ongoing action of County disregard of FLSA mandates on record-keeping and retaliatory discharge were willful violations of the *Fair Labor Standards Act*, § 211 (c) and § 215 (a) (3), and Gibson is entitled to such punitive damages as authorized by the provisions of the *Fair Labor Standards Act*, § 216.

COUNT XII

CLAIMS AGAINST ADA COUNTY FOR THE ATTEMPT TO MALICIOUSLY AND FRAUDULENTLY PROSECUTE GIBSON, TO FRAUDULENTLY OBTAIN ENTRY OF A JUDGMENT AGAINST GIBSON FOR $8,528.89, WHEN ADA COUNTY KNEW THE COUNTY, ITS SHERIFF'S OFFICE, AND ITS COUNTY PAYROLL DEPARTMENT WERE THEN IN VIOLATION OF THE *FAIR LABOR*

Appendix 73

STANDARDS ACT, 29 U.S.C., § 201 _ET SEQ._ (FLSA), AND VIOLATE GIBSON'S RIGHTS BY FORCING HER TO BE ON ADMINISTRATIVE LEAVE WITHOUT PAY, FORCED PAY REDUCTION, AND TERMINATING GIBSON'S EMPLOYMENT IN VIOLATION OF THE PROVISIONS FLSA

148. Gibson does re-allege each of the Allegations set forth and contained in Paragraphs 1 through 147 above, inclusive, as though said allegations were set forth and contained in full herein.

149. That in addition to said allegations of fact set forth above, concerning attempts at prosecution, leave without pay and forced reduction in pay without authorization, on August 29, 2001, said Ada County, through its agents, sent Gibson a written demand for payment in the amount of $8,528.89, requesting Gibson reimburse Ada County for the erroneous overpayment made to Gibson's compensation, which Ada County had disbursed through their direct deposit program; that Ada County knew Gibson did not owe Ada County, once a full audit was conducted and reveal compensation was actually owed to Gibson.

150. That on November 7, 2001, Ada County did then file its Complaint, therein stating it had a cause of action against Gibson, and alleged Gibson received a "mixed paycheck" and had mistaken receipt of monies not due or owing for a period of eight (8) months, during which time "Defendant did not report the salary overpayment, nor did Defendant take steps to correct the error with Ada County", and that Gibson has "failed to return any of the overpaid amounts", and while stating, on several occasions, "she intends to repay the same."

151. That Gibson does allege, as a matter of law, this Complaint constitutes a violation of the *Fair Labor Standards Act*, § 215 (a) (3), and a violation of Idaho Code, § 18-2403, by wrongfully appropriating the property rights of Gibson and withholding property (wages, benefits, entitlements) from said Gibson, as the owner thereof. That Gibson is entitled to be fully compensated punitive damages for.their willful violations of FLSA and her property rights.

COUNT XIII

GIBSON 'S CLAIM FOR EMPLOYMENT REINSTATEMENT, PROMOTION, AND PAYMENT OF LOST WAGES AND ALL BENEFITS AS A RESULT OF THE COUNTY'S UNLAWFUL CONDUCT AND DISCRIMINATION, PURSUANT TO LAW, AND TITLE 29 U.S.C., § 216 (b)

152. Gibson does re-allege each of the Allegations set forth and contained in Paragraphs 1 through 151 above, inclusive, as though said allegations were set forth and contained in full herein.

153. That Gibson does allege, as a matter of law, Ada County's termination of Gibson's employment was a violation of due process, abuse of process, and a violation of its Ada County Code, of State statute, of public policy, and a breach of the implied covenant of good faith and fair dealing, and a violation of the *Fair Labor Standards Act*, § 215 (a) (3).

154. That at all times relevant, Gibson had established civil rights and property interests by virtue of her classified, permanent status employment with Ada County, having vested rights accruing to her under such tenured status, and had the

right to entitlements and to protections afforded to her under the *Public Employees Protection Act*, Idaho Code, § 6-2101 *et* seq., and the *Fair Labor Standards Act* (FLSA), Title 29 U.S.C., § 201 *et seq.*, as carried into the provisions and enforced under the Ada County Personnel System, identified in § 1-7C-1 through § 1-7C-10, Ada County Code, and entitled to receive all rights, entitlements and protections, which have been denied her, and entitled to be fully reinstated and compensated for all damages incurred as a result of the wrongful actions of said Ada County.

155. That pursuant to the job descriptions of the Ada County Sheriff's Office Budget Director, Kelli Bolicek, and Payroll Specialists, Marshia Eiguren and Merrily Wilfong, those individuals, acting in behalf of Ada County, are vested with the responsibility to assure Gibson's payroll records (and payroll disbursement) are in compliance with all terms, provisions and conditions of the *Fair Labor Standards Act*, 29 U.S.C., § 201 *et seq.*, and no employer or agent thereof, being said Sheriff Killeen, R. Monte MacConnell, Greg Bower, Arville Glenn, Scott Johnson, or any Ada County Payroll personnel can transfer, or otherwise delegate any provision, term or condition required of the employer to the employee, under any lawful process.

156. That the "pay voucher" or County "claim form", as used by Ada County, prior to January 10, 2002, did violate the provisions of FLSA, and did constitute a violation of Gibson's property rights and employment interests, and said document is neither an official or lawful document for any employment purposes under FLSA.

157. That–it has been confirmed only Gibson was terminated as a result of this administrative payroll error, and

each of the three (3) Ada County employees directly involved in the creation and perpetuation of the administrative overpayment error, and deposit of funds under the County's direct deposit system, have retained their positions and remained employed with Ada County in the same position they had when the administrative error was created, and the overpayment discovered. That none of these employees were interrogated, exposed to undue influence or duress, abuse of process, threatened, harassed, disciplined, separated, threatened to resign, terminated, ordered to attend meetings, placed under surveillance, or threatened criminally, notwithstanding their direct, sole cause and exclusive involvement in the creation and perpetuation of the administrative error.

158. That the retained employment of those above-identified employees, but wrongful termination of Gibson, does demonstrate and constitute an arbitrary and capricious policy of discriminatory conduct, within the administration of the Ada County and the treatment of its classified employees, and does constitute a violation of the *Fair Labor Standards Act*, § 215 (a) (3), and for all reasons alleged above, including this discriminatory action, Gibson is entitled to full reinstatement of her employment.

COUNT XIV

CLAIM FOR DAMAGES AS A RESULT OF DISCRIMINATORY AND UNLAWFUL CONDUCT, LACK OF DUE PROCESS, DENIAL OF DUE PROCESS, AND ABUSE OF PROCESS

159. Gibson does re-allege each of the Allegations set forth and contained in Paragraphs 1 through 158 above,

inclusive, as though said allegations were set forth and contained in full herein.

160. That pursuant to Title 29, U.S.C. § 215 (a) (3), Ada County has discriminated against Gibson throughout their entire engagement, once the overpayment error was discovered by the County, and then pursued a pattern of violating Gibson's rights, which were established July 10, 1997; that said rights are afforded among other sources, under the federal *Fair Labor Standards Act* (FLSA). 29 U.S.C. § 201 *et seq.* The County has violated Ada County Codes, State, and Federal Laws on issues of compensation, and did engage in acts of undue influence and duress, threat and extortive conduct, abuse of process, lack of due process, denial of due process, harassment, discrimination, arbitrary and capricious conduct, and violations of the doctrines of implied covenant of good faith and fair dealing and Idaho public policy, which conduct ultimately culminated in the termination of Gibson's classified permanent employment, and has deprived her entitlements to both wages and benefits due her under her classified employment, with lasting impact to her family and to her and their combined quality of life.

161. That Gibson is entitled to recover liquidated damages as a result of each of the discriminatory acts, each of the acts of willful conduct, and each of the violations of FLSA, the effects of which has resulted in withheld salaries, wages and benefits as identified in Counts I, II, III, IV, V, VIII, AND XIII above, and damages are entitled to be awarded in accordance with the provisions of the *Fair Labor Standards Act*, § 216 (b).

COUNT XV

Appendix 73

CLAIM FOR INJUNCTIVE RELIEF AGAINST ADA COUNTY, ADA COUNTY SHERIFF'S OFFICE AND ADA COUNTY PAYROLL DEPARTMENT

162. That Gibson does re-allege each of the Allegations set forth and contained in Paragraphs I through 161 above, inclusive, as though said allegations were set forth and contained in full herein.

163. That at various occasions, including but not limited to July 20, 1999 and August 2, 1999, said Ada County, and its Departments of Payroll and Ada County Sheriff, through their elected officials or agents, did violate Title 29 U.S.C., § 211 (c), in that they did wrongfully attempt to transfer unto Gibson, through the use of the "pay voucher" and "claim form", the duty and statutory responsibility of the employer to keep and maintain accurate wage and salary records under 29 U.S.C., § 211 (c), and such attempt does constitute a violation of said federal statute, Title 29, U.S.C., § 211 (c), as the employer has the sole burden of keeping such proper records of wages, hours, and other conditions and practices of employment.

164. That any employer who has failed to make and maintain adequate and accurate records (and disbursements) as required by federal law and regulations, cannot thereafter contend any amounts owing to their employees could not have been ascertained with mathematical exactitude, as the ascertainment of payment is the result of the employer's failure to comply with the record-keeping requirements of the *Fair Labor Standards Act*, as a matter of law, as the employer cannot transfer this statutory obligation for accurate record-keeping under 29 U.S.C., § 211 (c), to the employee.

165. That Ada County, beginning January 10, 2002, no longer requires County employees to sign a "pay voucher" or "claim form" before disbursing the wages employees are entitled to receive, as the "pay voucher" or "claim form" as before used is now deemed, in fact, to have violated state law and the requirements of the *Fair Labor Standards Act.*

166. That Gibson does allege, as a matter of law, this former action of requiring from her a signature on the "pay voucher" or "claim form" was a violation of the *Fair Labor Standards Act*, § 215 (2), which makes it "unlawful for any person to violate any of the provisions of §206 or § 207..."

167. That Gibson is entitled to recover regular pay, overtime pay, and liquidated damages as a result of the ongoing discriminatory conduct and willful violations of FLSA during Gibson's employment with Ada County, as identified in Counts I, II, III, IV, V, VI, VII, VIII, IX, X, XI, XII, XIII AND XIV above, and damages are provided for in accordance with the provisions of the *Fair Labor Standards Act*, § 216 (b).

168. That Gibson should be afforded injunctive relief and protection by this Court, restraining Ada County, Ada County Payroll Department, and the Ada County Sheriff's Office from further violating the *Fair Labor Standards Act*, § 206, § 207, § 207 (k), § 211 (c), § 215, including § 215 (a)(2), § 215 (a)(3), and § 215 (a)(5), pursuant to the *Fair Labor Standards Act*, Title 29 U.S.C., § 217.

169. That Gibson does reserve her right hereafter, as well as in the event the above-entitled action is removed to The United States District Court, Boise, Idaho, to further amend these pleadings (including the caption) to include all real

parties of interest, which may include, but not limited to, the following named potential parties of interest:

1. ADA COUNTY SHERIFF'S OFFICE;

2. VAUGHN KILLEEN, acting individually and in his official capacity under color of State Law as ADA COUNTY SHERIFF;

3. R. MONTE MacCONNELL, acting individually and in his official capacity under color of State Law as LEGAL ADVISOR TO THE ADA COUNTY SHERIFF;

4. ARVILLE GLENN, acting individually and in his official capacity under color of State Law as a law enforcement official for ADA COUNTY UNDER THE SHERIFF;

5. SCOTT JOHNSON, acting individually and in his official capacity under color of State Law as a law enforcement official for ADA COUNTY UNDER THE SHERIFF;

6. GREG BOWER, acting individually and in his official capacity under color of State Law as ADA COUNTY PROSECUTING ATTORNEY;

7. DOES I thru X, acting individually and in an official capacity, under color of State law.

WHEREFORE, Gibson as Defendant and Counterclaimant, does pray for entry of Judgment as follows:

1. That Plaintiff recover nothing whatsoever by their Complaint, and their assertions, allegations and claims be dismissed with prejudice.

2. That an Order be entered, directing Ada County Payroll Department to engage the services of an independent agent to conduct an unbiased audit, retained at the County expense, with judicial authorization to reconcile all salary entitlements concerning Gibson for regular wages, overtime wages, compensation time, sick leave, earned vacation, insurance (medical, life, family), Workman's Compensation and disability benefits, retirement benefits, and all other benefits provided to Ada County employees, through the period of her protected and tenured employment as a classified permanent employee.

3. That Gibson reserves the right to file further amendments to her pleadings as may be needed, to further address and confirm her rights, interests, and protected entitlements, and accrued damages, and right to reinstatement of employment with Ada County to the extent not fully addressed herein.

4. That Gibson recover all wages, compensation, benefits, entitlements, awards and injunctive relief sought, as alleged in COUNTS I, II, III, IV, V, VI, VII, VIII, IX, X, XI, XII, XIII, AND XIV, and be awarded equal amounts as and for liquidated damages and punitive damages, as allowed pursuant to the *Fair Labor Standards Act*, § 216 (b).

5. That Gibson recover all costs and attorney fees incurred in this action pursuant to the *Fair Labor Standards Act*, § 216 (b), and under Idaho Code, § 6-2106 (Idaho Code, § 6-2101 *et seq.*), and by virtue of Rule 54, I.R.C.P.

6. That all records of each interrogation, and all events of the investigation and termination of Gibson be permanently removed from all locations and offices of Ada County government offices currently retaining such information, currently known to include, but not limited to: (1) Defendant's Personnel File, (2) the Ada County Sheriff's Office, (3) the Ada County Payroll Department, (4) the Criminal Division of the Ada County and Canyon County Prosecutor's Office, and (5) the Civil Divisions of the Ada County and Canyon County Prosecutor's Office.

7. That the Ada County Sheriff, Vaughn Killeen, be assessed and fined pursuant to the authority vested by the *Fair Labor Standards Act*, § 216, for repeated and willful violations of § 206, § 207, § 207 (k), §211 (c), § 215 (a)(2), § 215 (a)(3), and § 215 (a)(5) of said *Fair Labor Standards Act*.

8. That this Court, pursuant to Title 29 U.S.C., § 217, issue an injunction against Ada County, Ada County Payroll Department and the Ada County Sheriff's Office to restrain said employer(s) from engaging in further violations of the mandatory requirements of the *Fair Labor Standards Act*.

9. That this Court, pursuant to Title 29 U.S.C., § 217, issue an injunction against Ada County, Ada County Payroll Department and the Ada County Sheriff's Office to restrain said employer(s) from engaging in further abuse, misapplication and violations of the "*7k exemption*" and utilize the computation and payment of overtime wages only as

defined for employees as "law enforcement", and not those non-commissioned employees that have no power to arrest, which includes the "white shirt" in the civil sector of the Jail Facility.

10. That this Court issue a directive to the Secretary, United States Department of Labor, directing the Secretary to initiate an investigation, as provided for in Title 29 U.S.C., § 211 (a), regarding the wages, hours, record-keeping and other conditions and practices of the Ada County Payroll Department and the Sheriff's Office, as it may pertain to the compensation of employees of the Ada County Sheriff's Office, to identify the violations in specific detail, and prevent repeat of these violations in the future.

11. Gibson does allege her damages do exceed the jurisdictional limits of $10,000.00 of the Magistrate Court of this state, and this action is within the jurisdiction of the District Court.

12. For such other and further relief as this Court may deem just and proper in the premises.

Dated this 2nd day of February 2004.

s/ Vernon K. Smith
Vernon K. Smith
Attorney for Defendant/Counterclaimant

Appendix 73

STATE OF IDAHO)
: ss
County of Ada)

Stacy A. Gibson, being first duly sworn upon oath, deposes as follows:

That I have read the above and foregoing Defendant's Second Amended Counterclaim; that I know the contents thereof; and the facts therein stated I believe to be true.

s/ Stacy A. Gibson
Stacy A. Gibson
Defendant/Counterclaimant

SWORN AND SUBSCRIBED to before me this 2nd day of February 2004.

s/ Vernon K. Smith
Notary Public for Idaho
Residing at Boise, Idaho
My Commission Expires: 12/20/06

APPENDIX 74 – EXCERPT OF KELLI BOLICEK'S TESTIMONY TAKEN DURING GIBSON'S PERSONNEL HEARING ON JANUARY 26, 2000

Direct Examination Of Kelli Bolicek By Ada County, January 26, 2000, Page 80, Line 16-Page 83, Line 13

MS BRAUNER: Okay. Would you please state your name and spell it for the record.

MS. BOLICEK: Yes. Kelli Bolicek. K-e-l-l-i, last name B-o-l-i-c-e-k.

MS. BRAUNER: And what is your position with Ada County?

Ms. BOLICEK: I'm the budget officer (inaudible) sheriff's office.

MS. BRAUNER: And how long have you been the budget officer for the sheriff's office?

MS. BOLICEK: (Inaudible) and a half years.

MS. BRAUNER: Can you briefly describe basically your duties in that position?

MS. BOLICEK: Yes. I prepare the budgets and oversee the financial office which prepares the payables and receivables that we get (inaudible) in the jail and oversee payroll and some of the timekeeping (inaudible).

Appendix 74

MS. BRAUNER: Okay. How did you first become aware that there was an issue – a potential issue with Deputy Gibson – Stacy Gibson's payroll, her salary?

MS. BOLICEK: You want to know how I became aware of it?

MS. BRAUNER: Yeah.

MS. BOLICEK: Okay. I was working on a problem with a grant. It's a new thing with the system – with the payroll system that we can now put two jobs to a person and so with my grant people now, I have the federal portion of the grant in one job and (inaudible) another job.

So what I had done is the system would say not calculating some of the percentages – I shouldn't say percentages. The labor rate for these grant people for their overtime. And so I had asked payroll downtown to send me a list of all of the people that have two jobs out there and their overtime for the year.

And when I got that list and I have a copy of it, Stacy's name was on that list and I called them immediately that morning which was July 19 (inaudible). And saw that – or asked them why Stacy's name would be on my

(inaudible) list. She's not a grant employee. And their answer was that – I was speaking to (inaudible) and I do not know her name downtown but she was the person I was speaking on the phone. And her answer was, "Well, she is a grant employee," and I said, "No, she is not," and I said, "How could she even be on this list?" And she said that she has two jobs. And I said, "You mean to tell me she's working 40 hours at one job and 40 hours at another?" And she said, "Yeah." And I said, "What are her two job titles?" And she said police records clerk at BSU and jail (inaudible) in the jail.

And I said, "Well, she's not working 80 hours a week," and so I said, "Will you please verify that we are truly paying her for two jobs?" And they did and (inaudible).

MS. BRAUNER: And that was July 19, 1999?

MS. BOLICEK: Yes.

MS. BRAUNER: What action I guess did you – did you take any further action when you realized that?

MS. BOLICEK: Yes. I had payroll downtown make sure to verify what we were paying her and then I told our payroll records and I

could see where there were two jobs for her but we were only getting one check and I believe that that's how our people did not notice it because when we hand out vouchers (inaudible). When we hand those out, it comes as one; not two separate ones. So our person that hands those out would not have known that there were two because there's only one check. There's only one voucher.

MS. BRAUNER: Okay. Have you – have you ever encountered this type of error before?

MS. BOLICEK: No. And even when I found it, I called Cheryl Bower (phonetic) who is the (inaudible) office and asked if this had ever happened before and she said (inaudible).

MS. BRAUNER: Okay.

MS. BRAUNER: Those are all the questions I have for you.

MS. BOLICEK: Okay

Cross-Examination Of Kelli Bolicek By Gibson's Counsel, January 26, 2000, Page 83, Line 16-Page 85, Line 5

MR. SMITH: You have explained to us how it came to be that you (inaudible). Determination how it came to be that it existed --.

Appendix 74

MS. BOLICEK: How this could happen?

MR. SMITH: Yes.

MS. BOLICEK: Yes. But I was – actually Marshia should probably – well, I can tell you if you want or Marshia either one but she explained how it could happen to me.

MR. SMITH: You tell me what you under stood (inaudible).

MS. BOLICEK: Okay. Okay. What I understand happened is back then I'll say September – no, it would be October of '99 I believe, Stacy was transferred from BSU --.

MR. SMITH: '99 OR '98?

MS, BOLICEK: '98. I'm sorry.

MR. SMITH: (Inaudible).

MS. BOLICEK: And she was transferred from BSU (inaudible) to a jail position and what happens is they (inaudible) our people (inaudible put in a personnel (inaudible) form. That was submitted. Well, what happened is when she was transferred at mid month, they said – they send them (inaudible) pay 15 days at this rate of pay, $15 [15 days] at this rate of pay. Well, they keep two jobs out there to

pay at the two different rates of pay. And payroll then puts it in a tickler file to the next month to take off that prior job and that did not happen. (Inaudible).

MR. SMITH: So (inaudible)?

MS. BOLICEK: (Inaudible).

MR. SMITH: Is it a payroll error or a check writing error or a job description error? What have you done to classify it so you can (inaudible)?

MS. BOLICEK: Well, payroll has – I asked them to prepare a report now that tells me every month who has two jobs out there. (Inaudible) so this comes out (inaudible).

MR. SMITH: So is it your belief this happened because (inaudible)?

MS. BOLICEK: Yes.

MR. SMITH: (Inaudible)?

MS. BOLICEK: She had two jobs (inaudible).

MR. SMITH: Is that because a transfer (inaudible)/

MS. BOLICEK: (Inaudible) at the new job pay.

Appendix 74

Redirect Examination Of Kelli Bolicek By Ada County, January 26, 2000, Page 86, Line 22-Page 87, Line 5

MS. BRAUNER: When Mr. Smith asked you if an audit had been done, was an audit done specifically by hours that Stacy Gibson had worked?

MS. BOLICEK: Yeah.

MS. BRAUNER: And moneys that were due to her?

MS. BOLICEK: Yeah.

MS. BRAUNER: Along with your audit of the program and how the error occurred?

MS. BOLICEK: Yes.

Recross-Examination Of Kelli Bolicek By Gibson's Counsel, January 26, 2000, Page 87, Line 9-25

MR. SMITH: Essentially you asked if you audited the Stacy Gibson hours. Is Stacy both a salaried employee and also an hourly employee (inaudible).

MS. BOLICEK: She's salary but (inaudible). So it becomes an hourly employee (inaudible).

MR. SMITH: So does that mean she does two different (inaudible)?

Appendix 74

MS. BOLICEK: No. We pay – everyone gets their regularly monthly salary and then overtime that is turned in is calculated and sent in in a (inaudible) hourly. But the system automatically phases (inaudible) unless someone would terminate (inaudible) month or something, (inaudible).

MR. SMITH: And would the fact that she is both salaried (inaudible) and then get an hourly employee, (inaudible), is that (inaudible).

MS. BOLICEK: No.

APPENDIX 75 – EXCERPT OF MARSHIA EIGUREN'S TESTIMONY TAKEN DURING GIBSON'S PERSONNEL HEARING ON JANUARY 26, 2000

Direct Examination Of Marshia Eiguren By Ada County, January 26, 2000, Page 88, Line 15-Page 91, Line 13

MS. BRAUNER: Okay. Could you please state your name for the record and spell your last name.

MS. EIGUREN: Marshia Eiguren, E-i-g-u-r-e-n.

MS. BRAUNER: What is you position with Ada County?

MS. EIGUREN: Payroll specialist.

MS. BRAUNER: How long have you been in that position?

MS. EIGUREN: About (inaudible).

MS. BRAUNER: And can you please give us a brief description of the kinds of work that you do, your duties in that position?

MS. EIGUREN: Well (inaudible).

MS. BRAUNER: Okay. Thank you. How did you – how and when did you first become aware of a potential problem with over payment of Deputy Stacy Gibson's salary?

MS. EIGUREN: I believe it was in June (inaudible).

MS. BRAUNER: And how did you become aware of it? Did you get a phone call or did someone talk to you about it?

MS. EIGUREN: There were several employees out there that had like two jobs. And the program wasn't calculating that overtime (inaudible). She came (inaudible) once a week (inaudible).

MS. BRAUNER: Once a week or once a month?

MS. EIGUREN: Yeah, once a month. Once a month (inaudible). And (inaudible) so when we went to check on it, Ms. Gibson's name came up on the list. (Inaudible) yeah, I think she (inaudible) information we had given and the she called me (inaudible).

MS. BRAUNER: Do you have – I guess you know exactly how the over payments occurred?

MS. EIGUREN: (Inaudible).

MS. BRAUNER: How did they occur?

HEARING OFFICER: Just for the record, she needs to repeat audibly – audibly yes or no, whatever it is, without shaking her head.

MS. EIGUREN: Okay.

Appendix 75

MS. BRAUNER: Can you explain how that occurred?

MS. EIGUREN: In October of each year the employees get a raise and in this situation, there was the one job as a records clerk. And then in the middle of the month, she started a new job as a jail (inaudible). And they split the two salaries for that month of October. And then in November the one job was supposed to be an (inaudible) of this job. And we failed to do that.

MS. BRAUNER: When you say we failed, who --.

MS. EIGUREN: Marilee (phonetic) and I, (inaudible). October 3, we do (inaudible). A lot of stuff I don't get (inaudible). So I missed (inaudible).

MS. BRAUNER: Okay. How would you – how would you characterize what happened either by yourself or Marilee? Would there I guess – was there any kind of intent? Was it intentional it wasn't kicking out a second job?

MS. EIGUREN: Oh, no. There's no reason for us to give or take away salaries.

MS. BRAUNER: It's simply an error?

MS. EIGUREN: It was just an error. Overlooked it.

MS. BRAUNER: To your knowledge, has this type error ever occurred before?

MS. EIGUREN: No.

MS. BRAUNER: In the nine years that you've been there, your are haven't experienced --.

MS. EIGUREN: I haven't. I don't recall. If it has, it hasn't been caught.

MS. BRAUNER: Once you became aware of the problem, what did you or your office do to correct it?

MS. EIGUREN: Well, immediately we had to go back what paid and what should have been paid to everybody, federal, state (inaudible). And I believe it was an administrative leave for a while, July (inaudible).

MS. BRAUNER: Okay. And at some point, did you go in and remove the second job?

MS. EIGUREN: Oh, yes (inaudible).

MS. BRAUNER: Okay.

MS. BRAUNER: I'm finished.

Appendix 75

Cross-Examination Of Marshia Eiguren
By Gibson's Counsel, January 26, 2000,
Page 91, Line 16-Page 92, Line 14

MR. SMITH: (Inaudible). Shows in October then (inaudible)?

MS. EIGUREN: Yes. (Inaudible) a second job, (inaudible).

MR. SMITH: You split the salary, does that mean that you gave 50 percent --.

MS. EIGUREN: We were told to pay (inaudible) hours on the job and (inaudible) hours on the second job.

MR. SMITH: (Inaudible) hours?

MS. EIGUREN: Uh-huh.

MR. SMITH: And who told you that?

MS. EIGUREN: (Inaudible).

MR. SMITH: So the (inaudible) in the sheriff's office told you to pay her 88 hours on each job?

MS. EIGUREN: Yes.

MR. SMITH: And so it was from the instruction of the sheriff's office that it continued that way?

MS. EIGUREN: (Inaudible), just for that month, October.

MR. SMITH: Just for that month. The following month of October, did you get any instruction from the sheriff's office?

MS. EIGUREN: No. On that one, (inaudible).

MR. SMITH: (Inaudible) on that status form, that told you what to pay for the month of October, was the accounting (inaudible) on the status form?

MS. EIGUREN: No.

APPENDIX 76 – ADA COUNTY SHERIFF'S OFFICE POLICY MANUAL, § 7.05 (2) (MEMBERS' RIGHTS), EFFECTIVE OCTOBER 1, 1998 AND APPROVED BY ADA COUNTY SHERIFF, VAUGHN KILLEEN

SECTION 7.05 MEMBERS' RIGHTS

(2) The interview shall be conducted at a reasonable hour, preferably when the member is working unless the seriousness of the investigation requires otherwise. If the interview is conducted while the member is off duty, compensation shall be granted in accordance with regular department procedures.

APPENDIX 77 – ADA COUNTY SHERIFF'S OFFICE POLICY MANUAL, § 7.05 (4) (MEMBERS' RIGHTS), EFFECTIVE OCTOBER 1, 1998 AND APPROVED BY ADA COUNTY SHERIFF, VAUGHN KILLEEN

SECTION 7.05 MEMBERS' RIGHTS

(4) The member under investigation shall not be subjected to offensive language or threatened with punitive action except that a member refusing to respond to questions or submit to an interview must be informed that failure to do so may result in the termination of the interview process and institution of disciplinary penalties.

APPENDIX 78 – ADA COUNTY SHERIFF'S OFFICE POLICY MANUAL, § 7.05 (7) (MEMBERS' RIGHTS), EFFECTIVE OCTOBER 1, 1998 AND APPROVED BY ADA COUNTY SHERIFF, VAUGHN KILLEEN

SECTION 7.05 MEMBERS' RIGHTS

(7) No member will be subjected to punitive action because of the exercise of privileges granted under this order or the exercise of any right under the U.S. Constitution, Idaho Constitution, or applicable law.

APPENDIX 79 – ADA COUNTY AUTOMATIC PAYCHECK DEPOSIT AUTHORIZATION, DATED AUGUST 6, 1998 AND SIGNED BY GIBSON

Employee Name	**Employee Number**	**Department**
Stacy A. Gibson	~~*2885*~~ *54224*	*Patrol*

Account Located At (Depository)	**Branch**
Washington Mutual Bank	*Five Mile Center* *10751 W. Overland Rd.* *Boise, ID 83709*

Depository's Transit Routing Number	**Checking Account Number (attach a void check)**
123271978	*406-306452-4*

I hereby authorize Ada County to initiate credit entries and to initiate, if necessary, debit entries and adjustments for any credit entries in error to my account indicated above. I also authorize the above named depository to credit and/or debit the same to my account.

I understand that I will receive an earnings slip showing gross pay and itemized deductions each pay period.

Employee Signature	Date Signed
s/ Stacy A. Gibson	*8-6-98*

Copy Of Void Check Attached

(5)

No. 06-233

FILED
SEP 18 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

STACY A. GIBSON,

Petitioner,

v.

ADA COUNTY, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Idaho

BRIEF IN OPPOSITION

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OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED[1]

1. Whether a sheriff's employee who retained overpaid wages and was subsequently terminated by the sheriff for good cause, has a right of action under the Fair Labor Standards Act (FLSA), 29 U.S.C. § 216(b), for unsubstantiated allegations of retaliation and violations of § 211(c) and § 207(k) of the FLSA that, even if actionable and provable, occurred outside of the applicable statute of limitations?

2. Whether a county's termination procedure for a sheriff's employee, which included written notice of intent to terminate prior to a hearing before the sheriff and a second hearing before a neutral hearing officer, provided more due process than is required under *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985)?

3. Whether a county's good faith attempt to provide judicial review of a sheriff's employee's termination through an ordinance, which was later determined by the Idaho Supreme Court to be ineffective, can form the basis for a due process claim given that the county's administrative process did not preclude the sheriff's employee from filing a lawsuit to address any perceived violations of due process?

---

[1] Respondents disagree with Petitioner's characterization of the underlying facts and law applicable to this matter. As a result, Respondents have rephrased the questions presented to more accurately frame the issues before this Court.

QUESTIONS PRESENTED – Continued

4. Whether allegations of a misclassification of a sheriff's employee under 29 U.S.C. § 207(k) in an unrelated FLSA collective action lawsuit can form the basis for a state law fraud claim with respect to a different sheriff's employee who (i) was aware of the existence of the collective action, (ii) is outside the parameters of the collective action, (iii) is outside of the applicable statute of limitations, and (iv) did not properly allege fraud during the underlying proceedings?

5. Whether the Idaho Supreme Court suppressed due process by denying a petition for writ of certiorari when it had already reviewed three (3) related cases on appeal (brought by Petitioner) regarding the same subject matter?

6. Whether the statute of limitations for a 42 U.S.C. § 1983 claim begins to run on the date that a terminated sheriff's employee had actual knowledge her termination was final or whether it continues to run while the terminated sheriff's employee unsuccessfully seeks repeated redress through the judicial system for misperceived wrongs?

LIST OF ALL PARTIES

Petitioner:

Stacy A. Gibson

Respondents:

ADA COUNTY, a political subdivision of Idaho;

ADA COUNTY SHERIFF'S OFFICE;

VAUGHN KILLEEN, acting individually and in his official capacity under color of State Law as ADA COUNTY SHERIFF;

R. MONTE MACCONNELL, acting individually and in his official capacity under color of State Law as LEGAL ADVISOR TO THE ADA COUNTY SHERIFF;

ARVILLE GLENN, acting individually and in his official capacity under color of State Law as a law enforcement official for ADA COUNTY UNDER THE SHERIFF;

SCOTT JOHNSON, acting individually and in his official capacity under color of State Law as a law enforcement official for ADA COUNTY UNDER THE SHERIFF;

DOES I thru X

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF ALL PARTIES	iii
TABLE OF AUTHORITIES	v
OPINION BELOW	1
JURISDICTION	1
STATEMENT	2
Idaho Sup. Ct. Docket No. 29694	4
Idaho Sup. Ct. Docket No. 30976	5
Idaho Sup. Ct. Docket No. 31553	6
U.S. Court of Appeals for the Ninth Circuit, Docket No. 06-35600	7
Petition for Writ of Certiorari – Idaho Sup. Ct. Docket Nos. 29694/30976/31553	9
ARGUMENT	9
Idaho Sup. Ct. Docket No. 29694	10
Idaho Sup. Ct. Docket No. 30976	15
Idaho Sup. Ct. Docket No. 31553	19
Petition for Writ of Certiorari – Idaho Sup. Ct. Docket Nos. 29694/30976/31553	26
CONCLUSION	26

TABLE OF AUTHORITIES

Page

CASES

Barth v. Canyon County, 918 P.2d 576 (Idaho 1996) 15, 16

Brennan v. Maxey's Yamaha, Inc., 513 F.2d 179 (8th Cir. 1975) 23

Chardon v. Fernandez, 454 U.S. 6 (1981) 12

Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985) ..... i, 18, 22

Daw ex rel. Daw v. Sch. Dist. 91 Bd. of Tr., 41 P.3d 234 (Idaho 2001) 19

Delaware State College v. Ricks, 449 U.S. 250 (1980) 12

Electors of Big Butte Area v. State Bd. of Educ., 308 P.2d 225 (Idaho 1957) 18

Ellis v. Dyson, 421 U.S. 426 (1975) 10

Foster v. Walus, 347 P.2d 120 (Idaho 1959) 18

Gallagher v. Ada County, et al., No. CV OC 0202022 (Idaho 4th Dist. Ct., Ada County, 2004) 20

Gibson v. Ada County Sheriff's Office, No. 01-015332, Indus. Comm'n, Idaho 23

Gibson v. Ada County, 69 P.3d 1048 (Idaho 2003) 4

Gibson v. Ada County, 72 P.3d 845 (Idaho 2003) 2, 3, 4, 9, 15, 19, 26

Gibson v. Ada County, 133 P.3d 1211 (Idaho 2006) 1

Gibson v. Ada County, No. CV 05-263-S-EJL, 2006 WL 507955 (D. Idaho, March 1, 2006) 8, 14, 15

Gibson v. Ada County, No. CV 05-263-S-EJL (D. Idaho, June 6, 2006) 8

TABLE OF AUTHORITIES – Continued

Page

Halpern v. Bristol Bd. of Educ., 52 F. Supp. 2d 324 (D. Conn. 1999) 13, 14

Hansen v. White, 762 P.2d 820 (Idaho 1988) 15, 16

Heck v. Humphrey, 512 U.S. 477 (1994) 11

Henderson v. State, 715 P.2d 978 (Idaho 1986) 13

Hoesterey v. City of Cathedral City, 945 F.2d 317 (9th Cir. 1991) 12

Kelly v. City of Chicago, 4 F.3d 509 (7th Cir. 1993) 14

Knickerbocker, et al. v. Ada County, Idaho, No. CV 04-288-S-BLW (D. Idaho) 20

Lambert v. Ackerley, 180 F.3d 997 (9th Cir. 1999) 21, 22, 23

McNulty v. Sandoval County, No. Civ. 05-221-BB/ACT (D. New Mexico, August 15, 2005) 26

Patsy v. Bd. of Regents of the State of Florida, 457 U.S. 496 (1982) 10

Pounds v. Denison, 766 P.2d 1262 (Idaho 1988) 11

Raper v. Lucey, 488 F.2d 748 (1st Cir. 1973) 11

State v. Concrete Processors, Inc., 379 P.2d 89 (Idaho 1963) 18

State v. Finch, 315 P.2d 529 (Idaho 1957) 18

State v. Fodge, 824 P.2d 123 (Idaho 1992) 11

Terlecky v. City of Ruidoso Downs, No. Civ. 04-1121, BB DJS, (D. New Mexico, January 24, 2006) 26

Thompson v. City of Shasta Lake, 314 F. Supp. 2d 1017 (E.D. Cal. 2004) 11

Woodbridge v. County of Ada, No. 95957 (Idaho 4th Dist. Ct., Ada County) 20

TABLE OF AUTHORITIES – Continued

Page

Young v. Bd. of Comm'rs of Twin Falls County, 177 P.2d 162 (Idaho 1947) 19

Zamora v. Village of Ruidoso Down, 907 P.2d 182 (N.M. 1995) 26

CONSTITUTIONS

Idaho Const. Art. XVIII, § 6 15

STATUTES

28 U.S.C. § 1257 2

28 U.S.C. § 2101(c) 1

29 U.S.C. § 207(k) ..... i, ii, 20, 21

29 U.S.C. § 211(c) ..... i, 21

29 U.S.C. § 215(a)(3) 21, 22, 23

29 U.S.C. § 216(b) ..... i, 21, 25

29 U.S.C. § 255 24

42 U.S.C. § 1981 ..... 5, 10

42 U.S.C. § 1983 ..... ii, 5, 8, 10

42 U.S.C. § 1985 10

42 U.S.C. § 1985(3) 5

Idaho Code § 67-5272(1) 16

ORDINANCES

Ada County Code § 1-7G-3 16

Ada County Code § 1-7G-3.A(5) 3, 24

TABLE OF AUTHORITIES – Continued

Page

Ada County Code § 1-7G-3.A(20) 3, 24
Ada County Code § 1-7G-3B 17
Ada County Code § 1-7G-3C 17
Ada County Code § 1-7G-3D 17
Ada County Code Title 1, Chapter 7 ..... 16, 17
Ada County Code Title 1, Chapter 11 16
Ada County Ordinance No. 612 17

RULES

U.S. Supreme Court Rule 10(b)(c) 9
U.S. Supreme Court Rule 13(1) 1
U.S. Supreme Court Rule 42(2) 27
Idaho Rule of Civil Procedure 84(a)(1) 15

OTHER AUTHORITIES

Ada County Sheriff's Office Policy Manual, § 9.04 ..... 3, 24

OPINION BELOW

The opinion of the Idaho Supreme Court (Pet. App. 1a) deciding three (3) related cases (Idaho Sup. Ct. Docket Nos. 29694, 30976, and 31553) is reported as *Gibson v. Ada County*, 133 P.3d 1211 (Idaho 2006). An order denying Petitioner's petition for writ of certiorari with the Idaho Supreme Court (Pet. App. 34a) was filed April 25, 2006.[2]

JURISDICTION

The opinion of the Idaho Supreme Court was entered on February 9, 2006. Pet. App. 1a. A petition for rehearing was filed by Stacy A. Gibson on March 2, 2006. A petition for writ of certiorari was filed by Stacy A. Gibson with the Idaho Supreme Court on March 22, 2006. Pet. App. 49a. An order denying the petition for writ of certiorari was entered on April 25, 2006. Pet. App. 34a. An order denying the petition for rehearing was entered on May 9, 2006. Pet. App. 32a.

Stacy A. Gibson submitted an application to Justice Anthony M. Kennedy for an order granting an additional sixty (60) days to file a petition for writ of certiorari on July 7, 2006. By letter dated July 12, 2006, Justice Kennedy extended the time to file a writ of certiorari to August 14, 2006. The petition for writ of certiorari was filed

[2] Petitioner also references a petition for writ(s) of mandamus regarding Idaho Sup. Ct. Docket No. 29968, which was denied by the Idaho Supreme Court on October 17, 2003. Pet. App. 156a. A review of the order denying the petition for writ(s) of mandamus would appear to be untimely as it is outside the ninety (90) day deadline set forth by 28 U.S.C. § 2101(c) and Rule 13(1) of the Rules of the Supreme Court of the United States.

on August 11, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

STATEMENT

Petitioner Stacy A. Gibson ("Gibson") was employed with the Ada County Sheriff's Office. *Gibson v. Ada County*, 72 P.3d 845, 846 (Idaho 2003).[3] At the time of her promotion to a jail technician in October of 1998, her salary increased to $1,550.00 per month.[4] *Gibson I* at 846. Gibson signed pay claim vouchers for each month between and including November 1998 and June 1999, which mistakenly indicated her monthly salary was $3,050.00 per month. *Gibson I* at 846. This resulted in an overpayment to Gibson of $8,528.89 in take-home pay over that eight-month period. Pet. App. 434a-37a, 439a-41a, 456a. Gibson did not bring this overpayment to the attention of anyone in authority at Ada County, nor did she take steps to correct the overpayment. *Gibson I* at 846; Pet. App. 250a.

Once the series of overpayments was discovered by Ada County, both an internal investigation and a criminal investigation were conducted by the Ada County Sheriff's

[3] Since the Idaho Supreme Court has previously reviewed the factual background of this matter in *Gibson v. Ada County Sheriff's Dept.*, 72 P.3d 845 (Idaho 2003) ("*Gibson I*"), which was not appealed to this Court and, therefore, not subject to further review, Respondents will attempt to cite to the court-established factual determinations to the extent possible. *See* Pet. App. 218a.

[4] Though the court correctly stated her pay increased to $1,550.00, it was supposed to increase to $1,575.00 per month. Regardless, Gibson was already paid an additional $294.32 on March 1, 2000, to correct the $25 difference, making this issue irrelevant. Pet. App. 456a.

Office. *Gibson I* at 846. Both investigations were conducted in a professional and respectful manner. Pursuant to the results of the internal investigation, the Ada County Sheriff's Office found that Gibson, by receiving and keeping wages not due or owing to her (i) conducted herself in such a manner as to be detrimental to the good order and discipline of the Ada County Sheriff's Office, (ii) made a materially misleading statement in an official report (her eight (8) pay claim vouchers), and (iii) conducted herself in a manner as to reflect unfavorably on the Ada County Sheriff's Office and herself.[5] Pet. App. 265a. On August 2, 1999, Gibson was given written notice of the Ada County Sheriff's intent to terminate her employment based on the above findings. *Gibson I* at 847; Pet. App. 265a-67a. Gibson appealed this decision and requested an informal hearing before the Ada County Sheriff. Pet. App. 260a-61a.

A pre-termination hearing was scheduled for August 23, 1999. Pet. App. 261a. Gibson did not attend this hearing, but was represented at the hearing by her attorney, Vernon Smith. Pet. App. 254a. In order to allow Gibson an opportunity to appear in person, the Ada County Sheriff and Mr. Smith agreed to continue the hearing and place Gibson on administrative leave without pay as of August 24, 1999. Pet. App. 254a. After the hearing was rescheduled five (5) more times due to Gibson's failure to appear, the hearing was finally held on December 20, 1999. Pet. App. 249a-50a. After the hearing, where Gibson was represented through her attorney, the

[5] Respectively, these are violations of Ada County Code § 1-7G-3.A(5), Ada County Code § 1-7G-3.A(20), and the Ada County Sheriff's Office Policy Manual, § 9.04.

Ada County Sheriff rendered his December 27, 1999 written decision (based on cause) to terminate Gibson's employment with the Ada County Sheriff's Office, which decision was appealed to the Ada County personnel hearing officer. Pet. App. 246a, 249a-50a.

After substantial discovery was conducted, a hearing was held with exhibits and testimony on January 25 and 26, 2000, which Gibson participated in with her counsel in front of the Ada County personnel hearing officer. *Gibson I* at 847. On February 15, 2000, the personnel hearing officer affirmed the Ada County Sheriff's decision to terminate Gibson's employment. *Gibson I* at 847.[6] Gibson subsequently appealed the personnel hearing officer's decision to the trial court, which affirmed the personnel hearing officer's decision on May 7, 2001. *Gibson I* at 847. Gibson then further appealed the decision to the Idaho Supreme Court, which dismissed the matter on May 28, 2003, on the grounds that the decision of the personnel hearing officer was not subject to judicial review. That decision was not appealed to this Court.[7]

Idaho Sup. Ct. Docket No. 29694 (Gibson II)[8]

On July 19, 2002, Gibson filed a complaint alleging various offenses by Ada County, the Ada County Sheriff's

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[6] Though *Gibson I* states the date as February 17, 2000, Gibson admits the correct date is February 15, 2000. *See* Gibson's petition at 10.

[7] Neither was the decision in *Gibson v. Ada County*, 69 P.3d 1048 (Idaho 2003), which denied Gibson's request to have certain exempt documents relating to this matter disclosed.

[8] In the interest of efficiency, various motions filed by Gibson that are not essential for purposes of addressing this writ of certiorari have not been referenced in the various procedural histories.

Office, Vaughn Killeen, R. Monte MacConnell, Arville Glenn, and Scott Johnson (together "Ada County"), including civil rights violations under 42 U.S.C. §§ 1981, 1983, and 1985(3). In response, Ada County filed a motion to dismiss. On February 19, 2003, the district court found in Ada County's favor and determined the two-year statute of limitations had run, that the complaint did not allege facts supporting a claim for racial discrimination, and that no notice of tort claim had been filed, which barred any state common law tort actions. Pet. App. 212a-13a. On March 5, 2003, Gibson subsequently brought a motion to reconsider, which was denied on April 18, 2003.

Gibson then filed a notice of appeal with the Idaho Supreme Court on May 30, 2003. Thereafter, Gibson filed a second untimely motion to reconsider with the district court on June 9, 2003, which was denied on August 28, 2003. While the matter was pending before the Idaho Supreme Court, Gibson filed a motion to remand the matter back to the district court. The motion to remand was denied by the Idaho Supreme Court on January 7, 2004. The Idaho Supreme Court reviewed the issues and arguments that were presented by the parties and affirmed the decision of the district court on February 9, 2006.

Idaho Sup. Ct. Docket No. 30976 (Gibson III)

On June 4, 2003, Gibson submitted to the Board of Commissioners of Ada County (the "Board") a petition for hearing and review of her termination. By letter dated July 2, 2003, the Board informed Gibson that Idaho law precluded it from overruling the Sheriff's decision to terminate Gibson. Pet. App. 216a. Despite the lack of authority to submit the petition to the Board or to have

the Board act on it, Gibson nevertheless filed a subsequent petition for judicial review with the district court (naming Ada County and the Ada County Sheriff's Office (together "Ada County")) and a motion to remand to the Board, claiming that the Board's refusal to grant Gibson a hearing was an action reviewable by the district court. The petition and motion to remand were denied by the district court on February 27, 2004, and reaffirmed on June 17, 2004. Pet. App. 146a, 139a.

Gibson filed a notice of appeal with the Idaho Supreme Court on July 28, 2004. The Idaho Supreme Court reviewed the issues raised by Gibson, including whether she was entitled to a declaratory judgment and whether the Board had authority to grant her a hearing. The court affirmed the decision of the district court and determined that because Gibson had failed to cite a statute that authorized the Board to review her termination, and because the court had no authority to issue a declaratory judgment, Gibson's appeal was brought frivolously, unreasonably, and without foundation and awarded attorney fees and costs to Ada County on February 9, 2006.

Idaho Sup. Ct. Docket No. 31553 (Gibson IV)

On November 7, 2001, Ada County filed a complaint seeking repayment of the $8,528.89 mistakenly overpaid to Gibson between November 1998 and June 1999 while she was an employee of the Ada County Sheriff's Office. On May 7, 2002, Gibson filed a counterclaim and then later moved to amend her counterclaim to include an additional cause of action under the Fair Labor Standards Act. On February 19, 2003, the district court denied Gibson's motion to amend. Pet. App. 214a. After further consideration, the district court determined that Gibson

could file an amended counterclaim purely as a matter of right, but not for purposes of bringing FLSA claims, which it had already determined were without merit. Pet. App. 188. Nonetheless, Gibson filed an amended counterclaim adding various claims under the FLSA. Pet. App. 474a. On September 16, 2004, the district court dismissed Gibson's amended counterclaim on the grounds that Gibson's FLSA claims were inapplicable and her tort claims were barred by statute. Pet. App. 132a. Ada County then moved for summary judgment on its claim of unjust enrichment, which was granted on December 10, 2004. Pet. App. 88a.

Gibson appealed to the Idaho Supreme Court on January 27, 2005. Though Gibson did not argue against the unjust enrichment claim, she believed she was entitled to offsets to the $8,528.89 granted to Ada County by the district court. After reviewing the issues and arguments, the court determined that an overpayment of wages is not a violation of the FLSA and that Gibson had otherwise failed to provided evidence that she was entitled to any reduction in the amount awarded to Ada County. On February 9, 2006, the court awarded Ada County its costs and attorney fees because it found that Gibson failed to properly address the basis of the district court's decision and that Gibson's attempt to ask the court to second guess factual determinations was frivolous, unreasonable, and without foundation.

U.S. Court of Appeals for the Ninth Circuit, Docket No. 06-35600 (Gibson V)

Though this matter is currently pending before the Ninth Circuit and not on appeal to this Court, its close relation to the cases on appeal warrants a short summary.

On July 5, 2005, Gibson filed a complaint in the United States District Court against Ada County, the Ada County Board of Commissioners and the Ada County Sheriff's Office alleging a civil rights action pursuant to 42 U.S.C. § 1983 for incidents that allegedly occurred in relation to her employment termination from the Ada County Sheriff's Office. Given the matter's similarity to the allegations already brought by Gibson in state court, the Ada County defendants filed a motion to dismiss, which was granted on March 1, 2006, on the basis of issue/claim preclusion and the expiration of the § 1983 statute of limitations on February 15, 2002. *Gibson v. Ada County*, No. CV 05-263-S-EJL, 2006 WL 507955 (D. Idaho, March 1, 2006).

Gibson subsequently submitted approximately 1700 pages of post-judgment filings, including a motion to alter or amend judgment and a motion to amend pleadings. On June 6, 2006, the district court determined that the filings merely mirrored the evidence already before the court and did not justify further relief. The court also determined that the request to amend pleadings was untimely because judgment had already been entered against Gibson. Lastly, the court determined that the post-judgment filings were unreasonable and awarded the Ada County defendants their costs and attorney fees. *Gibson v. Ada County*, No. CV 05-263-S-EJL (D. Idaho, June 6, 2006). Res. App. 1a.

On July 3, 2006, Gibson filed a notice of appeal to the Ninth Circuit. Gibson's appellate brief is currently required to be submitted by October 19, 2006.

Petition for Writ of Certiorari – Idaho Sup. Ct. Docket Nos. 29694/30976/31553

On March 22, 2006 (after the Idaho Supreme Court and the Federal District Court had ruled adversely against Gibson with respect to *Gibson II, III, IV,* and *V*), Gibson submitted a petition for writ of certiorari with the Idaho Supreme Court to undertake a review of Ada County's actions with respect to *Gibson I, II, III,* and *IV*.[9] Pet. App. 49a. After reviewing Gibson's arguments, the Idaho Supreme Court denied the petition. Pet. App. 34a.

ARGUMENT

Rule 10 of the Rules of the Supreme Court of the United States explains, "a writ of certiorari will be granted only for compelling reasons." The rule sets forth certain considerations used in making such a determination, including when:

> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;
>
> (c) a state court . . . has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

Rule 10(b)(c).

[9] As previously noted above, *Gibson I* was decided in 2003 and is, therefore, outside the scope of further review.

In the instant action, Gibson's petition fails to establish that either of these standards has been met. The Idaho Supreme Court's rulings do not conflict with any other state or federal court decisions. Furthermore, the Idaho Supreme Court has not decided a federal question that should be settled by this Court or decided a federal question in a way that conflicts with any relevant decisions of this Court.

Idaho Sup. Ct. Docket No. 29694 (Gibson II)

In its decision, the Idaho Supreme Court determined that (i) all of Gibson's tort-based claims were properly dismissed due to her failure to file a notice of tort claim, (ii) all of Gibson's 42 U.S.C. §§ 1981 and 1985 claims were properly dismissed due to her failure to allege any facts suggesting a conspiracy to discriminate on the basis of race or class, and (iii) Gibson was not required to exhaust administrative remedies prior to filing a 42 U.S.C. § 1983 claim. In her petition, Gibson does not dispute the first two rulings but does appear to argue that she was required to exhaust administrative remedies prior to filing a § 1983 civil rights action. However, this Court has already held that exhaustion of administrative remedies is not a prerequisite to filing a § 1983 claim. *Patsy v. Bd. of Regents of the State of Florida*, 457 U.S. 496 (1982); *Ellis v. Dyson*, 421 U.S. 426 (1975). As a result, Gibson cannot use administrative remedies as an excuse for missing the statute of limitations.[10]

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[10] It appears Gibson was already aware of this as evidenced by the fact that she filed her § 1983 claims in 2002, prior to the Board's determination in 2003 that it could not grant her petition for review, which Gibson claims was her final attempt at an administrative remedy.

In certain circumstances, an agency's decision may need to be ripe for review to trigger the statute of limitations. *See Raper v. Lucey*, 488 F.2d 748, 750 n. 3 (1st Cir. 1973).[11] However, that trigger occurred no later than February 15, 2000, when the hearing officer affirmed Gibson's termination. As a result, the statute of limitations expired no later than February 15, 2002, which is more than five (5) months before Gibson's July 19, 2002 complaint in this matter. Though not clear, it appears that in her petition Gibson argues that the statute of limitations for her § 1983 claim was tolled while the possibility of criminal prosecution against her existed and/or also tolled until July 2, 2003, when the Board informed her it could not grant her petition for review.[12] Both of these theories are misplaced.

The criminal prosecution issue was not raised at the district court level. As a result, the Idaho Supreme Court was precluded from reviewing it. *See State v. Fodge*, 824 P.2d 123, 126 (Idaho 1992). Even if this issue had been properly presented, it is still without merit. The cases cited by Gibson are not relevant to the current situation.[13] The cited cases deal with instances where criminal charges

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[11] Gibson cites *Pounds v. Denison*, 766 P.2d 1262 (Idaho 1988), for this proposition. However, that case only applies in situations where an administrative remedy is provided by statute, which is not the case here.

[12] In her briefing for the Idaho Supreme Court, Gibson also argued that Ada County's alleged violations of the FLSA and Gibson's due process rights also tolled the statute of limitations, though she has not clearly articulated such arguments in her petition. Regardless, Ada County discusses the inapplicability of Gibson's FLSA and due process claims later in this brief.

[13] *See Thompson v. City of Shasta Lake*, 314 F. Supp. 2d 1017 (E.D. Cal. 2004); *Heck v. Humphrey*, 512 U.S. 477 (1994).

were brought against an individual. No criminal charges were ever filed against Gibson.[14] Even if they had been, under the case authority she provides, the only claim periods that would potentially be tolled would be those that directly dealt with violations of civil rights as a result of the criminal prosecution. Nothing in these cases stands for the proposition that the mere possibility of the filing of criminal charges tolls all potential civil rights claims.

With regards to her second tolling theory, existing authority holds that the two-year statute of limitations in situations like Gibson's begins to run on the day the harm is known. *See Delaware State College v. Ricks*, 449 U.S. 250 (1980) (denial of tenure, not the expiration of a one-year terminal contract given to the plaintiff on the day his tenure was denied, was the alleged discriminatory act commencing the running of the statute of limitations); *see also, Chardon v. Fernandez*, 454 U.S. 6 (1981) (statute of limitations for terminated employee commenced on the date they received notice of their impending termination, not the later date on which the termination became final).

In *Hoesterey v. City of Cathedral City*, 945 F.2d 317 (9th Cir. 1991), the court faced a situation different from both *Ricks* and *Chardon* in that the action challenged was the denial of a pre-termination hearing and procedural due process. The court held that because the plaintiff would not know that the decision was final and that no further process was forthcoming until he was actually terminated, the statute of limitations began to run on the

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[14] The Canyon County Prosecuting Attorney's Office (reviewing the matter because of the potential conflict) determined a civil, rather than criminal, action against Gibson was more appropriate. Pet. App. 259a.

date of his termination. In the current matter, Gibson exhausted her administrative remedies no later than February 15, 2000, which is the date the personnel hearing officer rendered his decision regarding Gibson's employment termination. As a result, the statute of limitations expired on February 15, 2002. *See Henderson v. State*, 715 P.2d 978 (Idaho 1986) (the statute of limitations for judicial review of the termination of a state employee commences upon the personnel commission's final decision).

In *Henderson*, the court found that even with the right to judicial review of the Idaho personnel commission's final decision embedded in the statute, the plaintiff had exhausted his *administrative* remedies once the personnel commission rendered a final decision. *Id.* at 980. In this case, Gibson had exhausted her administrative remedies once the personnel hearing officer rendered his decision on February 15, 2000. The *Henderson* court went on to hold that the "last act" in terminating the plaintiff's employment was the personnel commission's decision, and that "last act" occurred on the day the personnel commission rendered its decision, thus commencing the running of the statute of limitations. *Id.* at 981. Under the guidance of *Henderson*, the "last act" of Ada County in terminating Gibson's employment was the decision of the personnel hearing officer. Thus, the statute of limitations commenced upon the rendering of that decision.

There is further support for this argument in federal case law. In *Halpern v. Bristol Bd. of Educ.*, 52 F. Supp. 2d 324, 329 (D. Conn. 1999), the District Court for the District of Connecticut, on similar relevant facts as the present case, held that "[i]n the context of wrongful termination where violations of civil rights are asserted, the

limitations period begins to run when the employee receives notice that the adverse decision has been made." Also, it found that § 1983 claims accrue when the conduct causes the harm and the claimant knows or has reason to know of the conduct and resulting harm. *Id.* The court went on to find that "[t]he reference to knowledge of the injury does not suggest that the statute does not begin to run until the claimant has received judicial verification that the defendant's acts were wrongful." *Id., citing Veal v. Geraci*, 23 F.3d 722, 724 (2nd Cir. 1994). Similarly, in *Kelly v. City of Chicago*, 4 F.3d 509 (7th Cir. 1993), the Seventh Circuit Court of Appeals held that the statute of limitations for a § 1983 action, based upon the revocation of a liquor license, accrued upon the notice of revocation rather than upon enforcement of the decision after judicial review of the revocation. Discussed in all of these cases is the fact that the plaintiffs were not barred from commencing their civil rights actions until after state administrative or judicial proceedings ended and each could have brought their action from the moment of the alleged wrongful act and injury.

The present case is similar. Gibson certainly could have brought her civil rights actions immediately after the alleged wrongful acts of Ada County. Redress for these alleged wrongs was not dependent upon any level of administrative or judicial review. Civil rights actions are independent creatures by their very nature. Gibson simply slept on her rights and is attempting to use a judicial appeal process as a method by which to revive that expired right. It is worth noting that not only did the Idaho Supreme Court reach this conclusion, but a federal district court similarly determined that "Gibson either knew or should have known of the injury giving rise to her § 1983

cause of action on February 15, 2000 . . . " and that her repeated requests for review do not toll her statute of limitations. *Gibson v. Ada County*, No. CV 05-263-S-EJL, 2006 WL 507955, *6 (D. Idaho, March 1, 2006).

Idaho Sup. Ct. Docket No. 30976 (Gibson III)

In this matter, the Idaho Supreme Court ruled that (i) Gibson failed to demonstrate that her petition for judicial review of the Board's non-action with respect to her request for a hearing was allowed by statute or constitutional authority,[15] (ii) Gibson's motion to remand the matter to the Board was nonsensical given the Board's lack of authority to review the Sheriff's termination decision,[16] and (iii) Gibson's request for a declaratory

[15] Under Rule 84(a)(1), I.R.C.P., "[a]ctions of state agencies or officers or actions of a local government, its officers or its units are not subject to judicial review unless expressly authorized by statute." Pet. App. 418a. Thus, before judicial review is proper, there must be a statute that expressly authorizes review of the specific action in question. In the case at hand, Gibson failed to identify any statute that allows judicial review of the Board's non-action regarding the petition. The Idaho Supreme Court also noted that, contrary to Gibson's contention, *Gibson I* did not provide an alternate basis for review of the Sheriff's decision. Pet. App. 20a.

[16] There is no process by which a board of county commissioners may review an employment decision of another elected county official. The elected officers of Idaho counties are granted the constitutional authority to appoint deputies. Idaho Const. Art. XVIII, § 6. Pet. App. 412a. The Idaho Supreme Court held that while a board of county commissioners may adopt a classified personnel system which limits the unfettered dismissal of the classified employee of another elected official (*Hansen v. White*, 762 P.2d 820 (Idaho 1988)), it is the various elected officials who are given the constitutional authority to determine who shall hold the position of deputies in their offices. *Barth v. Canyon County*, 918 P.2d 576 (Idaho 1996). The court also found, "[t]he framers . . . decided that it would be best to give the sheriff the power to appoint deputies 'without giving power to the county commissioners to interfere.'"

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judgment as to the constitutionality of certain Ada County ordinances and her entitlement to reinstatement and back pay was improper.[17] Gibson does not appear to directly dispute the Idaho Supreme Court's rulings and, instead, argues that she was not terminated for good cause and somehow deprived of due process. Though such arguments were not properly before the court, Ada County will address them for this Court's benefit.

Members of Ada County's classified service may be dismissed from employment or otherwise disciplined for good cause. Ada County Code § 1-7G-3 (Pet. App. 346a). However, before such a deprivation of property interests can be imposed, the employee has certain rights. When

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Id. at 580, citing 2 Proceedings and Debates of the Constitutional Convention of Idaho at 1819.

The *Hansen* case discusses the implied power of removal along with the constitutionally granted power to appoint. *Hansen* at 825. That case does not take away the sheriff's power to remove his own deputies, but limits that right by requiring cause for dismissal if the board has enacted a classified personnel system that requires cause for dismissal. In this case, the Board enacted a classified personnel system. That system, found in the Ada County Personnel Ordinance, Ada County Code Title 1, Chapters 7 and 11, limits dismissing classified employees to instances where cause is found. The Ada County Sheriff had the authority to determine whether cause was found in dismissing Gibson, which he did. The Board cannot "review" the Sheriff's determination in this matter.

As a result, it makes no sense to expect that a remand to the Board will create a record for review. At most, the only record that can exist is the July 2, 2003 letter from the Board to Gibson's counsel explaining its inability to grant the hearing that Gibson requests. *See* Pet. App. 216a. Since the Board cannot grant a hearing, no purpose is served by remanding the matter back to the Board.

[17] Idaho Code § 67-5272(1) requires a proceeding for declaratory judgment be instituted at the district court level, which Gibson failed to do.

serious employee discipline is contemplated, the Ada County Code requires the elected official in charge of the subject employee to provide the employee with a written notification of contemplated action, including a statement of the charges, allegations or inadequacies, and the evidence the action is based upon. Ada County Code § 1-7G-3B (Pet. App. 350a). The contemplated action cannot become effective until five (5) days from the date the employee receives the written notification. In those five (5) days, the employee is given the right to appeal the contemplated action to the elected official. Ada County Code § 1-7G-3C (Pet. App. 351a). The elected official then must give the employee an opportunity to respond to the allegations made. Ada County Code § 1-7G-3D (Pet. App. 352a).[18]

In the present case, the Ada County Sheriff followed all of the above procedures. Gibson was sent a notice of intent to terminate on August 2, 1999, setting forth the grounds for termination. Pet. App. 265a. Because of her alleged emotional difficulties, the Sheriff even extended to Gibson five (5) opportunities to respond to the allegations over a four-month period. Pet. App. 250a. It was not until after conducting a hearing on December 20, 1999, where Gibson was represented by her attorney, that the Sheriff determined that cause existed to terminate her. Pet. App. 249a. Gibson was then given a full evidentiary hearing on January 25 and 26, 2000, in front of a neutral hearing

[18] In her Petition, Gibson appears to attack Ada County Ordinance No. 612, which amends many provisions of Ada County Code Title 1, Chapter 7. *See* Pet. App. 399a. However, Gibson has not explained how she would have standing to make any claims regarding an ordinance that was enacted in 2006, many years after her employment termination.

officer who affirmed the Sheriff's decision on February 15, 2000. As a result, Gibson was provided proper due process.

In *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546 (1985), this Court stated that "[t]he essential requirements of due process . . . are notice and an opportunity to respond." In *Loudermill*, this Court addressed the question of what level of due process should be afforded to public employees during their termination. This Court held that all the process that is due in an employment termination is provided by a pre-termination opportunity to respond, coupled with post-termination administrative procedures as provided by state statute. *Id.* at 547-48. In the matter at hand, Gibson was given written notice of the Sheriff's intent to terminate her and then afforded both a pre-termination hearing with the Sheriff and second hearing with a neutral hearing officer. As a result, Gibson was not deprived of due process. Since the Idaho Code does not provide for any administrative procedures in this type of situation, Ada County, through Ada County ordinances, attempted to give Gibson more process than she was due by holding a hearing presided over by a neutral hearing officer, who affirmed her termination.

Gibson nonetheless argues that she has been deprived of due process. She cites a number of Idaho cases dealing with due process; however, none of them deal with employment termination and, more importantly, the cases dealt with situations where a statute already provided for judicial review, which is not the case here.[19] Essentially,

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[19] *See State v. Finch*, 315 P.2d 529 (Idaho 1957); *Foster v. Walus*, 347 P.2d 120 (Idaho 1959); *State v. Concrete Processors, Inc.*, 379 P.2d 89 (Idaho 1963); *Electors of Big Butte Area v. State Bd. of Educ.*, 308 P.2d 225 (Idaho 1957).

Gibson is attacking Ada County for attempting to provide her with more due process than Ada County could under the law. Since the legislature has not provided for another procedure, the Idaho Supreme Court's decision in *Gibson I* effectively tied Ada County's hands with regards to this matter. Gibson's continual reliance on a petition for judicial review is misplaced. Where the legislature has not provided for a statutory method of reviewing an elected official's termination decision, no right to an appeal exists. *See Daw ex rel. Daw v. Sch. Dist. 91 Bd. of Tr.*, 41 P.3d 234, 235 (Idaho 2001) (a party does not have the right to seek judicial review under the Idaho Administrative Procedure Act where there is no statute that expressly provides for an appeal to district court); *see also Young v. Bd. of Comm'rs of Twin Falls County*, 177 P.2d 162, 165-66 (Idaho 1947) (appeals are statutory and if the legislature did not provide for an appeal, no right of appeal exists). In light of this, the trial court proposed various alternatives that Gibson might be able to pursue if she believed she was wronged, including providing Gibson leave to amend to include common law claims, if applicable. Pet. App. 148a. However, Gibson did not exercise her leave to amend and, instead, sought ways to appeal the trial court's order denying her petition. Pet. App. 141a.

Idaho Sup. Ct. Docket No. 31553 (Gibson IV)

In its decision, the Idaho Supreme Court affirmed that summary judgment was proper on Ada County's claim against Gibson for unjust enrichment in the amount of $8,528.89 for overpayments she retained and that the amount by which Gibson was unjustly enriched was not subject to reasonable dispute. Though Gibson never argued against the finding of unjust enrichment, she does claim that she is entitled to relief under the FLSA that

would offset the amount awarded to Ada County. However, she only makes vague references to monies she mistakenly alleges she is entitled to under the FLSA, without providing any credible evidence to support her contentions. In addition, Gibson continues to ignore the fact that any alleged FLSA claims are inapplicable to this matter since (i) an overpayment of wages by Ada County is not a violation of the FLSA, (ii) Gibson does not meet the standards for a retaliation claim under the FLSA, and/or (iii) the FLSA statute of limitations has expired.

Gibson's retaliation argument is convoluted and unsupported by existing law. It is apparently based on the theory that her receipt of overpayments of $8,528.89 in take-home pay each month between and including November 1998 and June 1999 was a violation of the FLSA. However, a mistaken overpayment by an employer is not a violation of § 211(c) of the FLSA.[20] Gibson has cited no law

[20] Gibson also appears to claim that she was misclassified under § 207(k) of the FLSA. However, instead of offering proof of any such violation involving her, she relies on the misstated facts of three cases involving Ada County. In the first of these, *Woodbridge v. County of Ada*, No. 95957 (Idaho 4th Dist. Ct., Ada County), the district court did not find that Ada County had violated § 207(k). *Gallagher v. Ada County*, No. CV OC 0202022D (Idaho 4th Dist. Ct., Ada County, 2004) did not involve an employee of the Ada County Sheriff's Office, let alone a jail technician, as was Gibson's position. Lastly, *Knickerbocker v. Ada County*, No. CV 04-288-S-BLW (D. Idaho), is an ongoing collective action under the FLSA that is limited in scope to jail technicians employed by the Ada County Sheriff's Office between June 8, 2001, and June 8, 2004, which is well after Gibson's tenure as an employee. Furthermore, the matter has only recently reached the certification stage and no determinations have been made regarding the merits of the plaintiffs' claims. Pet. App. 420a-23a. The existence of this case cannot form the basis of a state fraud claim since Ada County has not admitted to or been found by a court to have misclassified any jail technicians under § 207(k) during the time period of Gibson's

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to support her contention. Furthermore, § 216(b) does not provide an employee a private right of action for a violation of § 211(c). Gibson's failure to provide applicable authority on this issue is sufficient reason to deny her retaliation claims, however, there are several other reasons why her FLSA claims are misplaced.

To begin with, Gibson's claims of retaliatory action in violation of the FLSA are logically impossible given the timeline of events involved in this matter. Gibson appears to argue that she has a claim for FLSA violations under 29 U.S.C. § 215(a)(3), which states that it is unlawful:

> [T]o discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee . . .

It is unquestioned that Gibson did not file a complaint with or otherwise institute a proceeding with any supervisory entity (*e.g.*, the Department of Labor) prior to her termination. In *Lambert v. Ackerley*, 180 F.3d 997, 1008 (9th Cir. 1999), the Ninth Circuit Court of Appeals expanded the phrase "filed any complaint" to include communications by an employee to an employer "so long as an

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employment. Furthermore, a state law fraud claim that was not properly allegedly during the underlying proceedings is not applicable for review.

Gibson also refers to a 1997 memorandum from the Sheriff's legal advisor regarding the potential use of the § 207(k) exemption at the Boise State University substation, but this has little to do with use of the § 207(k) exemption at the Ada County jail where Gibson worked. Pet. App. 275a.

employee communicates the substance of his allegations to the employer (*e.g.*, that the employer has failed to pay adequate overtime, or has failed to pay the minimum wage) . . . " Nevertheless, Gibson is unable to demonstrate that even that criteria has been met.

In this case, Gibson never raised an issue of not being paid adequate overtime until well after December 27, 1999. As such, § 215(a)(3) is not applicable. Nonetheless, Gibson seems to argue that her alleged "complaints" (which are not properly substantiated in the record), about minor administrative errors in the past somehow qualify as a "complaint" within the meaning of § 215(a)(3). Not only is this conclusion unsupported by existing law, it is absurd to believe that it can form the basis of a retaliatory claim since Gibson was not and has not alleged that she was discharged or otherwise discriminated against for bringing these alleged "complaints."

Gibson does seem to allege that all action taken by Ada County beginning July 20, 1999, involving her was retaliatory in nature. July 20, 1999, was the date on which Gibson was interviewed pursuant to an internal investigation by the Ada County Sheriff's Office regarding her failure to bring her overpayment to the attention of anyone in authority at Ada County or to take steps to correct the overpayment.[21] However, Ada County has

[21] Gibson also makes an unsubstantiated claim of retaliation through a threat of criminal prosecution after "she served her request for a *Loudermill* hearing . . . " but Gibson does not properly set forth the basis for any such claim and, even if she could, it cannot be considered retaliation under the FLSA since Gibson had not alleged any FLSA violations at that point in time. *See* Gibson's petition at 9. Similarly, Gibson has also claimed she suffers from post-traumatic stress disorder, but fails to mention that the validity of her medical claims are still the

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always maintained that the overpayment was a result of a mistake on its part. As a result, there was never an attempt by Ada County to shift any record-keeping responsibilities to Gibson. What Ada County did find fault with was Gibson's conduct in keeping these funds (which have yet to be returned to Ada County) and in failing to report the overpayment. It was these actions that led to her termination.

In order to have a claim for retaliation under § 215(a)(3), Gibson must be able to show that (i) she complained to Ada County about inadequate overtime payment prior to her termination and (ii) that the immediate cause or motivating factor of her discharge was her assertion of statutory rights. *See Lambert* at 1008; *see also, Brennan v. Maxey's Yamaha, Inc.*, 513 F.2d 179, 181 (8th Cir. 1975). As discussed above, Gibson never "complained" about overtime payments until after her termination proceedings began. Though Gibson appears to contend that she did assert statutory rights, there is nothing in her pleadings that clearly indicates what those statutory rights were. The Ninth Circuit has held that "not all amorphous expressions of discontent related to wages and hours constitute complaints filed within the meaning of § 215(a)(3)." *Lambert* at 1007.

Even if it was somehow conceivable that Gibson made a valid "complaint," she must also demonstrate that such a "complaint" was the immediate cause or motivating factor for her discharge. Her discharge was based on the determination by the Ada County Sheriff that Gibson, by

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subject of another pending lawsuit. *See Gibson v. Ada County Sheriff's Office*, No. 01-015332, Indus. Comm'n, Idaho.

receiving and keeping the overpayments not due or owing to her, violated Ada County Code § 1-7G-3.A(5) in that she conducted herself in such a manner as to be detrimental to the good order and discipline of the Ada County Sheriff's Office and § 1-7G-3.A(20) in that she knowingly made a materially misleading statement in an official report (her eight (8) pay claim vouchers). The Ada County Sheriff also found that Gibson violated the Ada County Sheriff's Office Policy Manual, Section 9.04, in that she conducted herself in such a manner as to reflect unfavorably on the Ada County Sheriff's Office and herself. On February 15, 2000, a neutral personnel hearing officer affirmed the Ada County Sheriff's decision to terminate Gibson's employment. Gibson has not offered any other credible evidence regarding why she was terminated. It is clear why Gibson was terminated and the reasons had nothing to do with any alleged "complaint" made by her to Ada County.

Even if Gibson did have a basis for bringing FLSA claims, the statute of limitations for filing such claims lapsed. The statute of limitations applicable to the FLSA is found in the Portal-to-Portal Pay Act, 29 U.S.C. § 255. This states that an action to enforce a cause of action under the FLSA must be commenced within two (2) years after the cause of action accrued, except that a cause of action arising out of a willful violation may be commenced within three (3) years after the cause of action accrued.

Going back to the date that Ada County initiated this action, November 7, 2001, the earliest date from which Gibson could possibly have a valid claim is November 7,

1999,[22] which is more than three (3) months after the July 20, 1999 date put forth by Gibson. As such, all of her alleged claims under the FLSA relating to events that took place prior to November 7, 1999, must be summarily dismissed including, but not limited to, all claims related to (i) any alleged failure to pay her overtime, (ii) her interviews by Ada County Sheriff's Office personnel, (iii) her receipt of overpayments, (iv) placement on leave without pay, and (v) any alleged record keeping violations with respect to her. Since the November 7, 1999 date occurs after the events complained about, it is unclear how she can argue that she has valid FLSA claims.

Though Gibson may argue that such actions are willful and extend the statute of limitations to three (3) years, there is no evidence to support that contention. Since Gibson's violations are based on the conclusion that an overpayment is a violation of the FLSA, it logically follows that in order for a willful violation to exist, Gibson must be able to demonstrate that the overpayment made to Gibson was purposeful. Such a contention is absurd and has never been alleged by either of the parties.

[22] Ada County does not concede that the statute of limitations for Gibson's counterclaims relates back to the filing of Ada County's complaint. If the May 7, 2002 date of the filing of Gibson's original counterclaim is used as contemplated by 29 U.S.C. § 216(b) ("no employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought"), the FLSA statute of limitations would only extend back to May 7, 2000, which is almost an additional six (6) months later.

The Idaho Supreme Court denied Gibson's petition, presumably because it had already reviewed Gibson's claims in *Gibson I, II, III,* and *IV*. Gibson cites cases for the proposition that a writ of certiorari to a New Mexico trial court is proper when there is no statutory authorization for an appeal of an agency decision to the trial court.[23] However, it is not clear what such holdings have to do with the case at hand since Gibson did not submit a writ of certiorari to a New Mexico trial court. These cases do not stand for the proposition that a writ of certiorari can be submitted directly to a state supreme court, let alone one outside New Mexico, as Gibson has done here.

CONCLUSION

The petition for writ of certiorari and all other relief should be denied.

Furthermore, despite repeated direction from several state and federal courts that her arguments are without merit, Gibson continues to rely on those same arguments without providing any additional persuasive law or bringing into doubt the existing law on which the courts based their decisions. In addition to misconstruing case law and making arguments based on inapplicable cases, she has also gone out of her way to complicate this matter by filing

[23] *See McNulty v. Sandoval County*, No. Civ. 05-221-BB/ACT (D. New Mexico, August 15, 2005); *Terlecky v. City of Ruidoso Downs*, No. Civ. 04-1121, BB/DJS (D. New Mexico, January 24, 2006); and *Zamora v. Village of Ruidoso Down*, 907 P.2d 182 (N.M. 1995).

repetitive actions and unauthorized motions. Ada County has expended much time and effort in repeatedly dealing with this matter and related matters brought by Gibson.

Gibson and her counsel have submitted her petition frivolously and made arguments not warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law. Therefore, Ada County requests this Court explore the application of Supreme Court Rule 42(2) against Gibson and her counsel and award Ada County just damages.

Respectfully submitted,

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September 18, 2006

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

STACY A. GIBSON, Plaintiff,	)	
vs.	)	Case No. CV05-263-S-EJL
ADA COUNTY, et al,	)	ORDER
Defendants.	)	

Pending before the Court in the above-entitled matter are Plaintiff Stacy A. Gibson's motion to alter or amend judgment, motion to amend motion for summary judgment, motion to amend pleadings, and other related filings. Defendants have responded to the motions and the time for filing a reply has expired. The matter is ripe for the Court's review.

Standard on Reconsideration

Neither the Federal Rules of Civil Procedure nor the Local Rules provide for a motion to reconsider. However, the Ninth Circuit has stated that motions to reconsider should be treated as motions to alter or amend under Federal Rule of Civil Procedure 59(e). *Sierra On-Line, Inc. v. Phoenix Software, Inc.*, 739 F.2d 1415, 1419 (9th Cir. 1984). The scope and purpose of such a motion have been analyzed as follows:

> Motions for a new trial or to alter or amend a judgment must clearly establish either a manifest error of law or fact or must present newly discovered evidence. (Citations omitted). These motions cannot be used to raise arguments which

> could, and should have been made before the judgment issued. (Citations omitted). Moreover they cannot be used to argue a case under a new legal theory. (Citations omitted).

Federal Deposit Insurance Corp. v. Meyer, 781 F.2d 1260, 1268 (7th Cir. 1986);

> Whatever may be the purpose of Rule 59(e) it should not be supposed that it is intended to give an unhappy litigant one additional chance to sway the judge.
>
> . . .
>
> [A] rehash of the arguments previously presented affords no basis for a revision of the Court's order.

Illinois Central Gulf Railroad Company, v. Tabor Grain Company, 488 F.Supp. 110, 122 (N.D. Ill. 1980). Where Rule 59(e) motions are merely being pursued "as a means to reargue matters already argued and disposed of and to put forward additional arguments which [the party] could have made but neglected to make before judgment, [S]uch motions are not properly classifiable as being motions under Rule 59(e)" and must therefore be dismissed. *Davis v. Lukhard*, 106 F.R.D. 317, 318 (E.D. Va. 1984). *See also*, *Above the Belt, Inc. v. Mel Bohannan Roofing, Inc.*, 99 F.R.D. 99, 101 (E.D. Va. 1983) ("Plaintiff improperly used the motion to reconsider to ask the Court to rethink what the Court had already thought – rightly or wrongly."). The Ninth Circuit has identified three reasons sufficient to warrant a court's reconsideration of a prior order: (1) an intervening change in controlling law; (2) the discovery of new evidence not previously available; and (3) the need to correct clear or manifest error in law or fact, to prevent

manifest injustice. *School Dist. No. 1J v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993), *cert. denied*, 512 U.S. 1236 (1994). Upon demonstration of one of these three grounds, the movant must then come forward with "facts or law of a strongly convincing nature to induce the court to reverse its prior decision." *Donaldson v. Liberty Mut. Ins. Co.*, 947 F. Supp. 429, 430 (D. Haw. 1996).

Federal Rule of Civil Procedure 60(b)(6), states:

> On motion and upon such terms as are just, the court *may* relieve a party or a party's legal representative from a final judgment, order or proceeding for the following reasons . . . (6) any other reason justifying relief from the operation of the judgment.

Fed. R. Civ. P. 60(b)(6) (emphasis added). The Ninth Circuit has held that a party merits relief under Rule 60(b)(6) if he demonstrates "extraordinary circumstances which prevented or rendered him unable to prosecute [his case]." *Community Dental Services v. Tani*, 282 F.3d 1164 (9th Cir. 2002) (citing *Martella v. Marine Cooks & Stewards Union*, 448 F.2d 729, 730 (9th Cir. 1971) (per curiam); *see also Pioneer Investment Servs. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 393 (1993). The party must demonstrate both injury and circumstances beyond his control that prevented him from proceeding with the prosecution or defense of the action in a proper fashion *Id.*, 282 F.3d at 1167 (citing *United States v. Alpine Land & Reservoir Co.*, 984 F.2d 1047, 1049 (9th Cir. 1993)). Clause 60(b)(6) is a "catch-all" clause that is read as being exclusive of the other grounds for relief listed in Rule 60. *Id.* at n. 8 (citing *Lafarge Conseils et Etudes, S.A. v. Kaiser Cement & Gypsum Corp.*, 791 F.2d 1334, 1338 (9th Cir. 1986)).

Discussion

On February 28, 2006 the Court entered an order granting in part and denying in part Defendants' motion to dismiss. (Dkt. No. 34). The Court dismissed all of Plaintiff's claims and denied Defendants' request for attorney fees and entered judgment in favor of Defendants. (Dkt. No. 35). The following day Plaintiff filed the instant motions and related documents. (Dkt. Nos. 36-43, 46).

1) Motions to Alter or Amend:

The motion to alter or amend judgment and motion to amend asks the Court to vacate the judgment and allow Plaintiff to amend her pleadings and amend her motion for summary judgment and supporting materials, and file an amended response to defendants' motion to dismiss. Plaintiff subsequently filed an amended complaint and the requested amended memorandums. The filings are premised upon the same facts, arguments, and evidence as previously presented to the Court. Plaintiff has failed to point to any newly discovered evidence, clear error, or cite to a change in the applicable law. Accordingly, the Court denies the motion to alter or amend judgment and motion to amend summary judgment. As to the motion for relief pursuant to Rule 60(b), the Plaintiff has likewise failed to prove such relief is warranted.

Plaintiff's request to amend the pleadings is untimely. Judgment has been entered in this matter. Although Federal Rule of Civil Procedure 15 provides that leave to amend "shall be freely given when justice so requires," "[l]iberality in granting a plaintiff leave to amend is subject to the qualification that the amendment

not cause undue prejudice to the defendant, is not sought in bad faith, and is not futile. Additionally, the district court may consider the factor of undue delay." *Bowles v. Reade*, 198 F.3d 752, 757-58 (9th Cir. 1999) (citation omitted). Allowing an amended complaint at this stage in the proceedings is both futile and prejudicial to Defendants.

2) Defendants' Request for Costs and Attorney Fees:

Defendants have again requested that the Court award costs and attorney fees arguing the post-judgment filings are improper, frivolous, unreasonable, and a misuse of the judicial process requiring Defendants to incur further expenses. The Court previously denied Defendants' request for costs and attorney fees on the grounds that Plaintiff's claim was brought before this Court in good faith and upon the belief that the claim was a new cause of action under § 1983. (Dkt. No. 34). While that may have been true at the time, the instant motions and filings are wholly frivolous and without support in fact or law.

In a § 1983 action, attorney fees are awarded to a prevailing defendant pursuant to 42 U.S.C. § 1988(b) only "unreasonable, frivolous, merciless, or vexatious." *Vernon v. City of Los Angeles*, 27 F.3d 1385, 1402 (9th Cir. 1994). As the Court previously stated in its order granting the motion to dismiss the Ninth Circuit has found the "authority addressing the award of attorney fees and costs to defendants under Title VII or 42 U.S.C. § 1988 to be instructive . . . [i]n setting out the 'frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith' standard." In *Christiansburg Garment Co.*, the Supreme Court provided the following caveat:

> In applying these criteria, it is important that a district court resist the understandable temptation

> to engage in post hoc reasoning by concluding that, because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation. This kind of hindsight logic could discourage all but the most airtight claims, for seldom can a prospective plaintiff be sure of ultimate success. No matter how honest one's belief that he has been the victim of discrimination, no matter how meritorious one's claim may appear at the outset, the course of litigation is rarely predictable. Decisive facts may not emerge until discovery or trial. The law may change or clarify in the midst of litigation. Even when the law or the facts appear questionable or unfavorable at the outset a party may have an entirely reasonable ground for bringing suit.

434 U.S. at 421-22. The Plaintiff's post-judgment filings here are entirely unreasonable and Defendants are entitled to and hereby awarded costs and attorney fees incurred as a result of the post-judgment filings by Plaintiff.

ORDER

Based on the foregoing and being fully advised in the premises, Plaintiff's motions (Dkt. Nos. 36 and 38) are **DENIED**. Defendants are awarded costs and attorney fees incurred in responding to the post-judgment filings by Plaintiff.

DATED: **June 6, 2006**

[SEAL] /s/ Edward J. Lodge
Honorable Edward J. Lodge
U. S. District Judge

FILED
OCT 5 - 2006
OFFICE OF THE CLERK

No. 06-233

IN THE

Supreme Court of the United States

STACY A. GIBSON,

Petitioner,

v.

ADA COUNTY, *et al*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IDAHO

REPLY TO BRIEF IN OPPOSITION

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TABLE OF CONTENTS

	Page
TABLE OF CONTENTS.....	i
TABLE OF CITED AUTHORITIES.....	ii
TABLE OF APPENDICES (SUPPLEMENTAL).....	v
REPLY TO BRIEF IN OPPOSITION.....	1
SUMMARY AND CONCLUSION.....	10

TABLE OF CITED AUTHORITIES

Page

Cases

Bayer v. Town of Peshtigo,
Case No. 05-C-661, United States District Court,
E.D. Wisconsin, September 11, 2006..... 3, 5

Belas v. Juniata County School Dist.,
Civil Action No. 1:CV-04-505, United States District
Court, M.D. Pennsylvania, August 26, 2005..... 3, 4

Carey v. Piphus,
435 U.S. 247, 259 (1978)..... 2

Cleveland Board of Education v. Loudermill,
470 U.S. 532, 105 S.Ct. 1487 (1985)..... 1, 4, 5

Day v. Borough of Carlisle,
Civil Action No. 1:CV-04-1040, United States
District Court, M.D. Pennsylvania, July 10, 2006..... 3, 6

Gibson v. Ada County Sheriff's Department,
139 Idaho 5, P.3d 845 (2003)..... 8

Gibson v. Ada County, et al.,
142 Idaho 746, 133 P.3d 1211 (2006)..... 7, 8

Gibson v. Ada County, et al.,
CV05-263-S-EJL, United States District Court, Idaho... 9

Gibson v. Ada County, et al.,
06-35600, 9th Circuit Court of Appeals..... 10

Gilbert v. Homar,
520 U.S. 924 (1997)..... 1, 4

Homar v. Gilbert,
89 F.3d 1009 (3rd Cir. 1996)..... 1, 4

Table Of Cited Authorities

	Page
Horton v. Bd., Cnty. Com'rs, Flagler Cnty., 202 F.3d 1297 (11th Cir. 2000).....	3, 9
Kildare v. Saenz, 325 F.3d 1078 1085-1086 ((9th Cir. 2003).....	3
Koltonuk v. Borough of Laureldale, Civil Action No. 05-0106, United States District Court, E.D. Pennsylvania, July 18, 2006.....	3, 5
Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982).....	6
McNulty v. Sandoval County, No. CIV 05-221 BB/ACT, United States District Court, D. New Mexico, August 15, 2005.....	10
Mead v. Arnell, 117 Idaho 660, 791 P.2d 410 (1990.....	8
Nelson v. Whitesides, 103 Idaho 374, 647 P.2d 1246 (1982).....	8
Parratt v.Taylor, 451 U.S. 527 (1981).....	2, 8
Price v. City of Ormond Beach, Case No. 6:05-cv-1064-Orl-31KRS, United States District Court, M.D. Florida, Orlando Division, May 19, 2006.....	3, 6
Sanchez v. State of Idaho, Department of Corrections, ___ Idaho ___, Docket No. 32266, August 8, 2006.....	9
Sierra Lake Reserve v. City of Rocklin, 938 F.2d 951, at 956 (9th Cir. 1991).....	3

Table Of Cited Authorities

	Page
Terlecky v. Downs, No. CIV 04-1121 BB/DJS, United States District Court, D. New Mexico, January 24, 2006 and March 27, 2006	10
Zinermon v. Burch, 494 U.S. 113 (1990)	2, 5
Constitutions	
U.S. Constitution	5, 9
U.S. Constitution, 14th Amendment	9, 10
Idaho Constitution, Article V, § 9	8
Idaho Constitution, Article 18, § 6	6
Statutes	
29 U.S.C. § 201 *et seq.* (FLSA)	1, 2, 5
42 U.S.C. § 1983	2, 5, 6, 10
Idaho Code, § 10-1201	8
Idaho Code, § 10-1202	8
Idaho Code, § 67-5272(1)	7, 8
Idaho Administrative Procedures Act	7
Ada County Code, § 1-7G-3(O)	8

TABLE OF APPENDICES – SUPPLEMENTAL

Page

APPENDIX 80 – Verified Complaint In The Matter Of *Stacy A. Gibson v. Ada County, et al.*, CV OC 0205601D, Filed July 19, 2002..... 552a

APPENDIX 81 – Memorandum Decision And Order Entered By The U.S. District Court, March 1, 2006..... 589a

APPENDIX 82 – Judgment Entered By The U.S. District Court, March 1, 2006..... 605a

APPENDIX 83 – Letter From Gibson's Counsel To The Sheriff, Prosecuting Attorney, And Human Resource Director, Dated August 6, 1999, Denying All Accusations, Entitlement To Leave, With Pay, Announcing Gibson's Medical Condition, And Demanding Pre-Termination Hearing..... 606a

REPLY TO BRIEF IN OPPOSITION

Introduction

Petitioner and counsel are disappointed as to the manner Respondents continue to inaccurately represent relevant facts. The behavior is consistent with the adage if a deceitful story is told big enough and long enough, people will start to believe it.

Petitioner has continuously pursued relief from Ada County, the Idaho Courts, and the Idaho Supreme Court, seeking an **adequate procedure** to remedy the deprivation of her property right in tenured employment. She found no success in her effort to secure due process, to include the following:

(1) No adequate due process hearing prior to being placed on administrative leave, without pay, and no notice or opportunity to be heard. *See Gilbert v. Homar*, 520 U.S. 924, at 930 (1997); *Homar v. Gilbert*, 89 F.3d 1009, 1015 (3rd Cir. 1996);

(2) No adequate due process opportunity to participate in a pre-termination hearing, a prerequisite. *See Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487 (1985);

(3) No adequate due process opportunity to engage in an unbiased post-termination hearing before an unbiased tribunal;

(4) No adequate due process agency review hearing to challenge the basis claimed to terminate Petitioner's employment;

(5) No adequate due process procedure to judicially review the claimed basis to terminate Petitioner's employment, either by a Petition For Judicial Review to a lower court, review by the Idaho Supreme Court, Petition For Declaratory Judgment to the Idaho Supreme Court, Petition For Writ Of Mandamus to the Idaho Supreme Court, or Petition For Writ Of Certiorari to the Idaho Supreme Court;

(6) No adequate judicial review under the *Fair Labor Standards Act* (FLSA), 29 U.S.C. § 201 *et seq.*, to enforce

the "right of action" for overtime and regular wages due Petitioner; to seek redress for the retaliatory conduct of depriving Petitioner her statutory "right of action" under FLSA; and,

(7) No adequate judicial review under the *Civil Rights Act*, 42 U.S.C. § 1983, causing Petitioner need to seek federal court assistance over procedural due process.

ADEQUATE PROCEDURES ARE REQUIRED TO SATISFY PROCEDURAL DUE PROCESS

A significant procedural due process case was decided by this Court in *Zinermon v. Burch*, 494 U.S. 113, 125 (1990). The Due Process Clause encompasses a guarantee of **fair procedure**, and when state action deprives an individual of a constitutionally protected interest in "life, liberty, or **property**", that state deprivation is unconstitutional. *See also Parratt v. Taylor*, 451 U.S. 527, 537 (1981). "Procedural due process rules are meant to protect persons... from the mistaken or **unjustified** deprivation of life, liberty, or property". *See Carey v. Piphus*, 435 U.S. 247, 259 (1978).

A constitutional violation actionable under 42 U.S.C. § 1983 is not complete (actionable) **unless** and **until** the **state fails to provide due process**. *Zinermon*, 494 U.S., at 125-126, stated:

> "The constitutional violation actionable under § 1983 is not complete when the deprivation occurs; it is not complete unless and until the State fails to provide due process. Therefore, to determine whether a constitutional violation has occurred, it is necessary to ask **what process the State provided, and whether it was constitutionally adequate**. This inquiry would examine the procedural safeguards built into the **statutory** or **administrative procedure** of **effecting** the **deprivation**, and any remedies for erroneous deprivations provided by statute or tort law." (Emphasis added).

Federal courts rely upon *Zinermon*, 494 U.S., to determine **when** a procedural due process violation occurs and **when** the

accrual of the action begins. In these **cases**, the federal courts **confirm** a procedural **due process violation becomes actionable and accrues** when the **State fails to provide due process**. *See Bayer v. Town of Peshtigo*, Case No. 05-C-661, at 7, United States District Court, E.D. Wisconsin, September 11, 2006; *Koltonuk v. Borough of Laureldale*, Civil Action No. 05-0106, at 14-15, United States District Court, E.D. Pennsylvania, July 18, 2006; *Day v. Borough of Carlisle*, Civil Action No. 1:CV-04-1040, at fn7, United States District Court, M.D. Pennsylvania, July 10, 2006; *Price v. City of Ormond Beach*, Case No. 6:05-cv-1064-Orl-31KRS, at 8-10, United States District Court, M.D. Florida, Orlando Division, May 19, 2006; *Belas v. Juniata County School Dist.*, Civil Action No. 1:CV-04-505, at 14, United States District Court, M.D. Pennsylvania, August 26, 2005; *Kildare v. Saenz*, 325 F.3d 1078, at 1085-1086 ((9th Cir. 2003); *Horton v. Bd., Cnty. Com'rs, Flagler Cnty.*, 202 F.3d 1297, at 1300 (11th Cir. 2000); *Sierra Lake Reserve v. City of Rocklin*, 938 F.2d 951, at 956 (9th Cir. 1991).

Petitioner Was Denied Adequate Due Process When No Pre-Termination Or Administrative Leave Procedures Were Satisfied

On July 20, 1999, Petitioner was interrogated 2 ½ hours by County agents concerning payroll overpayment by erroneous County deposit to the joint account under the Direct Deposit Program. Petitioner was placed on administrative leave, **with pay**, told of the intent to immediately terminate her and then placed on administrative leave, **without pay**, and later officially terminated, all done without procedural hearings.

By July 28th, the Sheriff's Legal Advisor told Ms. Gibson's counsel if she did not resign, she would be prosecuted for felony grand theft, and terminated anyway. Petitioner rejected the threat. Consequently, on August 2, 1999, the Sheriff served his intent to terminate employment. Ms. Gibson had counsel send a letter (*Appendix 83*, p. 606a), denying all accusations, sought pay if on leave status, and

demanded pre-termination due process hearing required under *Loudermill* and the Merit System. The Sheriff fully understood Dr. Spencer could not allow his patient participate in a confrontational hearing until further notice. *Appendix 52*, p. 261a.

Without providing opportunity to respond to the leave status (*Appendix 48*, p. 254a-255a), the Sheriff's Advisor unilaterally took that action (in contradiction of federal law and Merit System) to declare leave status, without pay, and by federal law is considered *de facto* termination. *See Belas v. Juniata County School Dist.*, at 10-11; *Gilbert v. Homar*, 520 U.S., at 930; *Homar v. Gilbert*,89 F.3d, at 1015.

Even though aware of her continuing health condition (*Appendix 47, 50 & 54*), on December 27, 1999, the Sheriff terminated her employment effective immediately, without allowing procedural *Loudermill* hearing. Petitioner sought review, and demanded a "post-termination hearing" (even though not impartial) allowed in the County ordinance that purportedly authorized judicial review, but later declared by the Idaho Supreme Court a "constitutionally infirm" ordinance. *Appendix 38*, p. 225a, 227a.

Petitioner Was Denied An Adequate Post-Termination Procedure To Satisfy Procedural Due Process

The "post-termination" hearing was held January 25th and 26th, 2000, controlled by the Ada County Personnel Hearing Officer, who restricted discovery efforts to secure wage information and records which caused the mistaken deposits. The Hearing Officer maintained the termination by his ruling on February 15, 2000, and without providing any notice or opportunity to be heard, declared another violation never addressed in the firing or post-termination hearing. Not only has Petitioner not received **adequate** procedural due process in a pre- or post-deprivation process, the Hearing Officer, being a compensated agent and employee of Ada County, rendered a biased decision with inclusion of claims against Ms. Gibson not raised and had no review procedure.

When the Idaho Supreme Court got the appeal, it held (*Appendix 38*, p. 227a) Ada County "incorrectly instructed" Ms. Gibson to appeal the decision to the district court (utilizing a constitutionally "infirm" provision of the County Code), and "prevented this Court from addressing the merits of this matter". *Appendix 38*, p. 227a. Following that announcement, Ms. Gibson sought administrative agency review of the discipline and termination before Ada County Board of Commissioners. *See Appendix* 37, p. 216a.

Ms. Gibson also sought other process to including:

State District Court – Civil Rights Action

Ms. Gibson filed complaint in the State District Court (Case No. CVOC 0205691D) (*Appendix 80*), seeking redress for attempting to thwart procedural due process by threatening prosecution for grand theft to get her resignation (*Appendix 80*, p. 577a-578a), retaliation because she was involved in an FLSA proceeding (*Appendix 80*, p. 568a), orchestration of criminal charges (*Appendix 80*, p. 574a-577a), administrative leave, without pay (*Appendix 80*, p. 570a-571a; 578a-579a), denying a *Loudermill* hearing (*Appendix 80*, p. 568a), and depriving rights guaranteed by the U.S. Constitution Due Process Clause (*Appendix* 80, p. 584a).

The district court (*Appendix 35*, p. 212a-213a) granted Ada County's motion to dismiss and summary judgment, and stated, "a two-year statute of limitations applies to all Title 42 U.S.C. civil rights claims, and that the statute of limitations **on this action** expired on February 15, 2002, therefore the claims are time-barred". As announced in *Zinermon v. Burch*, 494 U.S., at 125, a constitutional violation actionable under § 1983 is not complete when the deprivation occurs, and does not accrue unless and until the State fails to provide due process. *See also Bayer v. Town of Peshtigo*, supra, at 7; *Koltonuk v. Borough of Laureldale*, supra, at 14-15.The **cause of action** for **due process violation** of Ms. Gibson's rights **did not accrue** on February 15, 2000 as stated by the Idaho Court (*Appendix 35*, p. 212a-213a) or as stated by the Idaho

Supreme Court (Appendix 1, p.16a); rather it accrued after Ms. Gibson was denied any adequate procedure (by Ada County, the Idaho Courts, and the Idaho Supreme Court), and did not accrue until May 9, 2006, when the Idaho Supreme Court denied Petition For Rehearing (*Appendix 2*, p. 32a-33a), and only then, did the cause of action accrue for a due process violation. *See Day v. Borough of Carlisle*, supra, at fn 7); *Price v. City of Ormond Beach*, supra, at 9-10; *McDaniels v. Flick*, 59 F.3d, at 461 (3rd Cir. 1995).

Constitutional violations actionable under § 1983 during the discipline and termination period were not complete until the Idaho Supreme Court failed to provide due process; it did not accrue when placed on administrative leave nor at termination on December 27, 1999, nor the decision of the Hearing Officer (February 15, 2000), but rather accrued when the Idaho Supreme Court denied any procedure to grieve those deprivations impacting her classified employment status, on May 9, 2006.

Agency Review – Ada County Commissioners

On July 2, 2003, County Commissioners rejected the request for an agency review hearing, stating they were without legal authority to review the decision over termination (*Appendix 37*, p. 216a-217a.). Respondents vehemently argued Article 18, § 6, Idaho Constitution (*Appendix D*, p. 412a), provides an elected county sheriff the right to terminate, because of the right to appoint. "Minimum procedural requirements", however, are federal law, and cannot be diminished by State procedures. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, at 432 (1982). "Any other conclusion would allow the State to destroy at will virtually any state-created property interest". *Id.* The adequacy of statutory procedures for deprivation of a right must be analyzed in **constitutional** terms. Article 18, § 6, Idaho Constitution, can never be allowed to mean a sheriff has the final right to **terminate** an employee, as the employee must be provided **adequate procedure** to **review** a violation

or deprivation of **procedural due process**.

State District Court – Judicial Review

After the Board rejected an administrative agency review hearing, Ms. Gibson sought judicial review of that rejection with a Petition For Judicial Review; the District Court denied relief (*Appendix 23*, p. 146a-148a), and stated, "There exists no statute or constitutional authority under Idaho law allowing a Board of County Commissioners to review the personnel decisions of other elected County officers". (The District Court accepted the unconstitutional argument of "finality" of a sheriff's decision).

Idaho Supreme Court – Writ Of Mandamus

Ms. Gibson sought relief from in the form of a Petition For Writ(s) Of Mandamus (*Appendix 27*, p. 158a-173a); requested a plain and speedy remedy to direct Ada County to reinstate employment, or allow procedural due process and proceed with an administrative agency hearing to create a factual record for judicial review. The Petition was denied (*Appendix* 26, p. 156-157).

Idaho Supreme Court – Declaratory Judgment

In *Gibson v. Ada County, et al.*, 142 Idaho 746, 133 P.3d 1211 (2006), the Idaho Supreme Court concluded, "Gibson was given a **pre**-termination hearing by way of the hearing conducted on February 15, 2000 [the Court was referring to the biased "post"-termination hearing held January 25th and 26th, 2000]. *See Appendix 1*, at page 16a. That factual error was met with a contradiction to its earlier decision on the issue of the *Administrative Procedure Act* in Idaho. Petitioner requested the Court enter declaratory judgment, since § 1-7G-3(O) of the County Code was held infirm, unconstitutional, contrary to procedural due process requirements, and repugnant in law.

The Court stated in *Gibson v. Ada County, et al.*, 142 Idaho 746:

> "It appears Gibson has ignored another Idaho Code section that clarifies how one properly requests a declaratory judgment" [Idaho Code § 67-5272(1)], and "Gibson's

request is outside the scope of this appeal and, therefore, this Court declines to review it". *Appendix 1*, p. 22a-23a.

What is profoundly interesting by this remark, is § 67-5272(1), *Idaho Code*, is "a" procedure found within the *Idaho Administrative Procedures Act*, and in *Gibson v. Ada County Sheriff's Department*, 139 Idaho 5, the Court held, "The Idaho Administrative Procedure[s] Act Does Not Govern This Action". *Appendix 38*, p. 222a-223a.

Pursuant to Article V, § 9, Idaho Constitution, and § 10-1201, *Idaho Code*, the Idaho Supreme Court is **authorized** with **original jurisdiction** to issue declaratory judgments in appropriate situations, as provided for in § 10-1202, *Idaho Code*. *See Mead v. Arnell*, 117 Idaho 660, 791 P.2d 410 (1990). § 10-1202 , *Idaho Code*, states:

> "Any person...whose **rights**, status or other legal relations are **affected by** a...**ordinance**, **contract** or franchise, may have determined any **question of construction** or validity arising under the...**ordinance**, **contract** or franchise and obtain a **declaration of rights**, **status** or other **legal relations** thereunder".

A declaratory judgment, to declare legal rights, has before been acknowledged by the Idaho courts. *See Nelson v. Whitesides*, 103 Idaho 374, 647 P.2d 1246 (1982).

To confuse matters, and to announce another legal contradiction with federal law, the Idaho Court concluded in *Gibson v. Ada County, et al.*, 142 Idaho 746, "Gibson was given a **pre**-termination hearing by way of the hearing conducted on February 15, 2000" (*Appendix 1*, p. 16a). This Idaho Court must have misconstrued *Parratt v. Taylor*, 451 U.S. 527, 537 (1981), believing the termination was a "random and unauthorized" act, rather than established procedure under the County's established Merit System, authorized by state law.

With two legal contradictions over established precedent, and factual error as to the definition of pre-termination proceedings, it is no wonder Petitioner questions Idaho's perception of the Due Process Clause under federal law.

In keeping with Petitioner's Question No. V, the Idaho Supreme Court is capable of entering conclusions contrary to federal authority, as we are given witness to contradictions over statutes that gives one to consider a "result oriented" attitude to insulate against governmental liability. To add further concern, in *Sanchez v. State of Idaho, Department of Corrections*, ___ Idaho ___, Docket No. 32266, filed August 8, 2006, the Honorable Justice Eismann chose his words carefully and stated, "Although **this Court has** the **power to misconstrue statutes**, it does not have the power to rewrite them". Are constitutional guarantees subject to the same power of misconstruction?

Idaho Supreme Court – Writ Of Certiorari

As a last resort to find adequate procedure to review Petitioner's claims, a Petition For Writ Of Certiorari was submitted to the Idaho Supreme Court (*Appendix 4 & 5*, p. 36a-59a), stating:

> "Ada County and the Idaho courts have not provided Gibson with an adequate remedy for the deprivation of her property rights under the Due Process Clause of the 14th Amendment. Faced with an inferior governmental administrative agency, acting under color of state law that has deprived Gibson of the procedural guarantee protected by the 14th Amendment, and the lack of an adequate state remedy, the Federal court would have jurisdiction and authority to proceed with the adjudication of Federal due process claims. See *Horton v. Bd., Cnty. Com'rs, Flagler Cnty.*, 202 F.3d 1297, at 1300 (11th Cir. 2000)".

This Petition was also denied (*Appendix 3*, p. 34a-35a).

Federal District Court – Title 42 Action

With no venue to remedy these violations under the 14th Amendment of the U.S. Constitution, a complaint was filed with the U.S. District Court of Idaho. *See Gibson v. Ada County, et al.*, Case No. CV05-263-S-EJL. That court acknowledged Ms. Gibson sought remedy of her rights to procedural due process, equal protection, and right to judicial

access (*Appendix 81*, p. 552a-588a), but the court dismissed the action under issue/claim/*res judicata* preclusion because of the State proceedings (*Appendix 82*, p. 605a). That dismissal is on appeal to the 9th Circuit Court under Case No. 06-35600. The preclusion theory should not have been the basis to dismiss, but rather demonstrate a cause of action has accrued for denial of procedural due process.

SUMMARY AND CONCLUSION

A classified, tenured employee can be terminated only for cause, and **must** be subject to due process procedural **review**, as a matter of federal law. The State has denied any adequate procedural due process review of the official action, and denied review of the violations of due process under the 14th Amendment, protected under 42 U.S.C. § 1983.

Federal courts have dealt with due process violations similar to Ms. Gibson, as announced in *Terlecky v. Downs*, No. CIV 04-1121 BB/DJS, United States District Court, D. New Mexico, March 27, 2006. *See also McNulty v. Sandoval County*, No. CIV 05-221 BB/ACT, United States District Court, D. New Mexico, August 15, 2005. In its Opinion on January 24, 2006, the *Terlecky* court ordered immediate reinstatement, and stated the personnel manual allowed appeal to state courts from decisions of council members, even though no statutory authorization was provided.

Petitioner has been denied adequate state procedures to satisfy procedural due process, and this Court must grant Certiorari to apply existing federal law.

Respectfully submitted,

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Attorney For Petitioner

APPENDIX 80 – VERIFIED COMPLAINT IN THE MATTER OF *STACY A. GIBSON V. ADA COUNTY, ET AL*, CV OC 0205601D, FILED JULY 19, 2002

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

Case No. CV OC 0205601D

COMPLAINT AND DEMAND FOR JURY TRIAL

Filed: July 19, 2002

STACY A. GIBSON[1],

Petitioner,

v.

ADA COUNTY, a political subdivision of Idaho; ADA COUNTY SHERIFF'S OFFICE; VAUGHN KILLEEN, acting individually and in his official capacity under color of State Law as Ada County Sheriff; R. MONTE MACCONNELL, acting individually and in his official capacity under color of State Law as Legal Advisor to the Ada County Sheriff; ARVILLE GLENN, acting individually and in his official capacity under color of State Law as a law enforcement official for Ada County under the Sheriff; SCOTT JOHNSON, acting individually and in his official capacity under color of State Law as a law enforcement official for Ada County under the Sheriff; and DOES I thru X,

Respondents.

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[1] Idaho Supreme Court Docket No. 29694

Appendix 80

COMES NOW The Plaintiff above named, and complains of the Defendants, and for her cause of action does allege as follows:

GENERAL ALLEGATIONS

I.

That Plaintiff, at all times mentioned herein, was a citizen of the United States of America, a resident of the State of Idaho, and at the time the events were occurring as alleged herein, was a resident of Ada County, Idaho.

II.

That Defendants, Ada County is a political subdivision of the State of Idaho; that Ada County Sheriff's Office is a Department within that political subdivision of Ada County; that Vaughn Killeen, Arville Glenn and Scott Johnson, are each individuals, and were acting as law enforcement officials under the color of State Law in their respective capacities as said Killeen was the Ada County Sheriff, and said Glenn and Johnson were the Sheriff Deputies and Detectives, respectively, and at all times herein, were engaged in that official capacity through the exercise of their power and authority, under color of State Law.

III.

That Defendant, R. Monte MacConnell, is an individual employed by Ada County as the Legal Advisor to the Ada County Sheriff, and as an Ada County employee, is subject to the provisions of Ada County Code, § 1-7-1B (2) (b) (4), and was acting in his official capacity as the legal advisor at all times herein while engaged in that official capacity, through

the exercise of his power and authority, under said color of State Law, and extended to him by Ada County and the Ada County Sheriff.

IV.

That Plaintiff is uncertain as to the true names and official capacities of Does I thru X, and does reserve the right to amend these pleadings to later identify other officials who had an official involvement through the exercise of power and authority under color of State Law as their actions relate to the events that gave rise to Plaintiff's claim, and at such time that such identities become known to Plaintiff, their names will be substituted into this proceeding, through an amended complaint, and Plaintiff does reserve the right to submit an amended complaint as allowed by Rule 10 (a) (4), I.R.C.P., upon the subsequent identification of those further officials acting under color of State Law.

V.

This action does arise under the United States Constitution, under the provisions of the Fourth, Sixth and Fourteenth Amendments to said Constitution, under Federal Law, and as particularly authorized for Civil Rights violations under Title 42 U.S.C., §§ 1981, 1983 and 1985 (3).

VI.

That the District Court, Fourth Judicial District, State of Idaho, County of Ada, does have and is empowered to exercise concurrent jurisdiction with and between the Federal and State Courts over actions arising under Federal Civil Rights statutes, including Title 42 U.S.C., §§ 1981, 1983 and 1985 (3), by virtue of Title 28 U.S.C., § 1343.

VII.

That the acts of the individual Defendants, as alleged herein, were being pursued in their official capacity as Ada County Sheriff law enforcement officials, acting as Sheriff, Deputies, Detectives, and legal advisor, respectively, under color of State Law and under their employment with Ada County, and through the authority of their office within the law enforcement department(s) of said Ada County, a governmental entity with whom they are employed.

VIII.

That Plaintiff did submit her employment application to the Ada County Sheriff's Office, a Department of Ada County, on April 22, 1997.

IX.

That Plaintiff did agree to the Ada County Sheriff's Office Hiring Standards on April 29, 1997, and the provisions of the Ada County Personnel System announced in the Ada County Code.

X.

That Plaintiff did complete all assessments made of her, and was hired as a Records Clerk, assigned to the Boise State University (BSU) Substation of the Sheriff's Office, at a base monthly salary of $1,215.00, effective July 10, 1997.

XI.

That compensation for Plaintiff's employment with Ada County Sheriff's Office was pursuant to and controlled by the provisions of the Ada County Sheriff's Office Policy Manual,

by Ada County Code, § 1-7C-1 *et seq.*, and in all respect was subject to and regulated by the terms and provisions of the Federal *Fair Labor Standards* Act, Title 29 U.S.C., § 201 *et seq* (FLSA), and the *Idaho Public Employees Protection Act*, § 6-2101 *et seq.*, Idaho Code.

XII.

That Plaintiff's employment was made, governed and protected by the provisions of various Federal, State and County laws, including the Ada County Sheriff's Office Policy Manual, Ada County Code, including the County Personnel System, Chapter 7 thereof, and the provisions of that Federal enactment, known as the Federal *Fair Labor Standards Act* (FLSA), Title 29 U.S.C., § 201 *et seq.*, and in accordance with the *Idaho Public Employees Protection Act*, § 6-2101 *et seq.*, Idaho Code.

XIII.

That Plaintiff did, as an employee of Ada County, acknowledge and agree to Ada County's policy against discrimination of employees, on July 24, 1997.

XIV.

That on July 24, 1997, Plaintiff was appointed to the position of a Noncommissioned Deputy of Ada County, by Captain Gil Wright, acting in his official capacity for the Sheriff of Ada County.

XV.

That Plaintiff was required to and did obtain, understand and comply with the provisions contained within the Ada

County Sheriff's Office Policy Manual, as directed in § 1.01 thereof.

XVI.

That from July 10, 1997 to August 1, 1998, Plaintiff was given probationary status as defined by Ada County Code, § 1-7E-1A, and during that period of probationary status, Plaintiff did exceed the established requirements of her employment, as confirmed by the eight Monthly Evaluation Reports.

XVII.

That on July 29, 1998, Plaintiff was recommended to receive "Permanent Status" employment, pursuant to Ada County Code, § 1-7E-2A & B and § 1-7B-1.

XVIII.

That Plaintiff was granted permanent status and became a "classified employee", effective August 1, 1998, as defined by Ada County Code, § 1-7B-1, pursuant to the provisions of Ada County Code, § 1-7E-2A & B and § 1-7B-1, and Plaintiff was entitled to all rights and the protection afforded her as a "classified employee" with certain established and vested property rights attendant thereto.

XIX.

That in prior months, and in particular, on April 22, 1998, the Ada County Commissioners sent letters to County Employees, requesting participation in the County's Direct Deposit Program, where the County would automatically deposit monthly pay into an employees' bank account. The

benefits of such participation was represented to be a savings to the County of approximately $167.00 a year, and specifically stated: "Your monthly pay will automatically be deposited into a checking or savings account of your choice without any action by you."

XX.

That Plaintiff submitted the Automatic Paycheck Deposit Authorization form on May 6, 1998, and by agreeing to such authorization, did thereby authorize Ada County to "initiate, if necessary, debit entries and adjustments for any credit entries in error to my (her) account indicated above".

XXI.

That in January 1998, Plaintiff was approved for transfer and promotion to the Sheriff's Jail Facility, as a Jail Technician II, and Plaintiff was transferred to Jail Technician II, effective October 16, 1998.

XXII.

That from July 10, 1997 through October 15, 1998, and on a regular monthly basis, Plaintiff was required to sign incorrect "pay vouchers", at times also called "claim forms." Plaintiff was told by Ada County Payroll personnel, "you will not be paid until you endorse the pay vouchers, even though the vouchers are in error". Pursuant to Ada County Code, § 1-7C-3B, "employees will receive their paycheck the last working day of each month", and said directive to require Plaintiff to sign incorrect documents before receiving any entitlement to earned pay, was not a condition contained within the Sheriff's Policy Manual, Ada County Code,

County Personnel System or the *Fair Labor Standards Act*, and to the contrary, the Ada County Payroll Department was not providing accurate payroll and accounting records as intended and required by Idaho Code, § 31-1509, or as mandated by said FLSA, Title 29, U.S.C., § 211 (c), which states in part, the employer "shall make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him, …..".

XXIII.

That in October 1998, Ada County Payroll Department did mistakenly create an administrative error in Plaintiff's wages because of her job assignments. Pursuant to Ada County Code, § 1-7C-5A, Plaintiff should have received her promotional five percent (5%) increase from $1,500.00 monthly to $1,575.00 monthly, for service as a Jail Technician II, but instead, was paid $1,550.00 as indicated in the Notice of Personnel Action. That by virtue of such record keeping administrative error, such error and omission did constitute a violation of Title 29 U.S.C., § 211 (c), being a record keeping provision of said FLSA.

XXIV.

That sometime after November 1, 1998 and before November 30, 1998, Ada County Payroll Department did further perpetuate another and more erroneous pay distribution error by mistakenly creating another record keeping administrative error regarding Plaintiff's wage, not only in the erroneous process by which Payroll combined Plaintiff's monthly wages for what they incorrectly and erroneously assessed to be two (2) different jobs, but also by

mistakenly and erroneously calculating her pay raise and overtime wages, the combined effect of which caused errors and omissions to occur that resulted in an overpayment made by direct deposit to the joint account of Plaintiff and her husband, for a period of eight (8) consecutive months by said Payroll Department, who had the debit and credit authority on such account. At the time this error was created, Plaintiff was fully classified as a permanent status employee, and had vested rights under such tenured status, and was to receive all entitlements and protection under the *Fair Labor Standards Act* (FLSA), 29 U.S.C § 201 *et seq.* and the *Idaho Public Employees Protection Act*, § 6-2101 *et seq.*, Idaho Code, as announced in accordance with the provisions contained in the Ada County Code, County Personnel System, § 1-7C-1 through § 1-7C-10 and as declared by Idaho statute.

XXV.

That Plaintiff does allege, and as a matter of law, does aver that every employer who is subject to the provisions of the *Fair Labor Standards Act*, is required to make, keep, and preserve wage records of hours worked and of other information of its employees for payment as prescribed by the regulations issued by the Administrator of the Wage and Hour Division, United States Department of Labor, pursuant to 29 U.S.C., § 211 (c), and case law.

XXVI.

That Plaintiff does allege, and as a matter of law, does aver that when the employer has failed to maintain adequate and accurate records for pay disbursement as required by law and regulations, the employer cannot contend any amounts owing their employees could not be ascertained with

mathematical exactitude, as the inability to ascertain payment and the erroneous consequences thereof, is the result of the employer's failure to comply with the record-keeping requirements of the *Fair Labor Standards Act*.

XXVII.

That Plaintiff does allege, and as a matter of law, does aver that the *Fair Labor Standards Act* has placed the duty of keeping accurate records of hours worked upon the employer, and when the employer makes any attempt to transfer that responsibility to the employee, the employer does so at his own peril under the provisions of Title 29, U.S.C. § 211, Fact Sheet No. 021, U.S. Department of Labor, Wage and Hour Division, and Code of Federal Regulations, Title 29, §§ 516.1 and 516.2, and case law.

XXVIII.

That Plaintiff does allege, and as a matter of law, does aver that the employer Ada County is subject to the provisions of said *Fair Labor Standards Act*, and cannot fault the employee with receiving excess pay, under such error and omission, whereby the employer mistakenly deposited funds and were unknowingly received in the employee's account by the direct deposit initiated and controlled by the employer, as the said employer has the sole duty to keep accurate pay records from which payments and disbursements are made.

XXIX.

That by January 13, 1999, Plaintiff, still unaware of the administrative errors, did complete all Jail training, and did receive three (3) exemplary Evaluation Reports. In the

reports, Sergeant Wellman did state (in his reviews of February 13, 1999 and March 17, 1999), that Plaintiff was "very self motivated" and "an asset to the Sheriff's Department". That in the third evaluation (June 14, 1999), Sergeant Ishiyama certified Plaintiff had then completed five (5) correspondence courses on jail techniques, all of which training occurred on her own time.

XXX.

That Plaintiff did complete 204 hours of approved technician courses, between January 20, 1999, and June 17, 1999, which occurred during Plaintiff's off-duty time.

XXXI.

That Plaintiff did volunteer for and was approved for additional overtime hours, due to her advanced training, and from January 1999 through June 1999, Plaintiff did work 281 hours overtime. That of those accrued overtime hours, 128 hours was taken as "cash compensation", and 153 hours was held in Plaintiff's "compensatory time" reserve for future use and discretion. That Plaintiff does allege, and as a matter of law, doe aver that under the Federal *Fair Labor Standards Act* (FLSA), 29 U.S.C. § 207 (k) and the *Code of Federal Regulations*, Title 29, § 553.230, every employee protected under said FLSA begins to accrue overtime compensation once the sum of 171 hours is worked within a twenty-eight (28) day period.

XXXII.

That from October 16, 1998 through July 20, 1999, Defendant had worked her 112 scheduled regular shifts (12

hours each), and did report as was required to report to her workstation fifteen (15) minutes prior to the start of each work shift, for mandatory Jail briefing.

XXXIII.

That from January 1, 1999 through June 30, 1999, Plaintiff did work, her scheduled regular shifts, did report as directed, and did accrue overtime of 281 hours, and did complete 204 hours of approved course study to benefit the Sheriff's Office only, as it related to jail supervision, and as a result thereof, Plaintiff had no time to challenge the capabilities or accuracies of the County Payroll Department computations, having prioritized her commitments to performing County work schedules, County overtime hours, and County course studies.

XXXIV.

That Plaintiff does allege, and as a matter of law, does aver that the employer cannot escape, delegate, or infer the record-keeping duty imposed by the *Fair Labor Standards Act* upon anyone else, as the employer has the duty to inquire into any and all conditions of the business and wages, and cannot be relieved of the duty by choosing to rely on subordinate activities. The record-keeping obligation is not discharged by any attempt of promulgation by the employer.

XXXV.

That Kelli Bolicek, Budget Director at the Sheriff's Office, did discover the administrative overpayment errors alleged above, and stated:, "I had asked payroll downtown to send me a list of all people that have two jobs out there and

their overtime for the year". Ms. Bolicek did contact Merrily Wilfong on July 19, 1999, requesting a copy of the overtime sheets for Ada County Sheriff's Office employees who were shorted pay from October 1998 through June 1999. That in fact, Ms. Bolicek was working at the time with the payroll system, connecting two (2) jobs to an employee, in situations where Federal grant money was funding one of the assigned jobs; that Payroll system errors were showing up in the differentiation between jobs, and County Payroll believed they owed at least nine (9) employees overtime from October 1998 through June 1999, due to record keeping errors, and Ms. Bolicek discovered Plaintiff's name appeared on the list, for it was believed Plaintiff was also shorted overtime pay, but later determined Plaintiff was not a "grant" employee, and determined instead an overpayment error occurred within the Payroll Department.

XXXVI.

That Ada County Sheriff's Office, the Ada County Payroll Department, and the Ada County Sheriff's Office Budget Director were each delegating the responsibility of keeping payroll records to various non-management employees, contrary to the *Fair Labor Standards Act*. That Plaintiff does allege, and as a matter of law, does aver that the responsibilities imposed by 29 U.S.C., § 211 (c) belong solely to the employer, Ada County, and said County cannot escape that responsibility by attempting to delegate record keeping to or the acceptance thereof to the injured employee.

XXXVII.

That on July 20, 1999, Detective Glenn did meet Detective Johnson and together did discuss the administrative errors made in direct deposits to Plaintiff's joint account; that on that date, while Plaintiff was resting at home, on medical leave, and recovering from surgery, said Glenn telephoned Plaintiff, requesting she come to the Sheriff's Office, whereupon Plaintiff did comply and did meet him at 3:00 p.m., believing it was a "special duty" work assignment needed upon her return to work after recovery.

XXXVIII.

That Detective Glenn did thereupon commence a threatening interrogation of Plaintiff, attempting in that process to orchestrate criminal charges against Plaintiff over said deposits, notwithstanding the deposits were the result of the County's own administrative error. This conduct was pursued in a most arbitrary, inappropriate, and capricious manner by said Glenn; that Detective Glenn called Plaintiff a liar, a thief, and threatened her with jail, and acted as though he was blind to the fact Plaintiff's pay was processed through a direct deposit system by the County, and neither Plaintiff nor her husband ever saw a paycheck or deposit slip. That in fact, said Detective Glenn did full well know the mistake was the result of an administrative errors, caused by inaccurate payroll and wage keeping practices.

XXXIX.

That Plaintiff does allege, and as a matter of policy and law, does aver that § 7.05 (4) of the Ada County Sheriff's Office Policy Manual, underwritten and approved by Sheriff Vaughn Killeen, does forbid threats of any punitive action

against a member of the Sheriff's Office, as Plaintiff was then a member, and by the County's acts, she was then regarded as a Sheriff's Office member under investigation.

XL.

That Detective Glenn pursued his accusatory actions throughout his affront towards Plaintiff, and despite his access to Sheriff Office work records, did wrongfully accuse Plaintiff of working less overtime hours.

XLI.

That Plaintiff does allege, and as a matter of policy and law, does aver that said Title 29 U.S.C., § 211 (c) mandates the employer's responsibility to always maintain accurate wage, pay and hourly records in an effort to avoid such false allegations and violations of protected rights as was undertaken and did occur here.

XLII.

That during said interrogation, Detective Glenn did then disclose the fact he knew it was all over an "administrative error"; that Glenn knew Plaintiff did nothing wrong, and somebody else had erred in depositing the checks.

XLIII.

That Plaintiff does allege, and as a matter of policy and law, does aver that said Title 29 U.S.C., § 211 (c) mandates the employer's responsibility to always maintain accurate records in an effort to avoid such erroneous disbursements and arbitrary acts of gross misconduct in a confrontational

setting, and violation of protected rights as was undertaken and did occur here.

XLIV.

That during said interrogation, Detective Glenn did falsely accuse Plaintiff with the design to develop some plan for the mistaken deposits; that Sergeant Johnson then threatened Plaintiff with the criminal charge of embezzlement, and Johnson told Plaintiff she was: "suspended"; that notwithstanding said threats, said § 7.05 (4) of the Ada County Sheriff's Office Policy Manual, as alleged above, does forbid threats of any punitive action against a member of the Sheriff's Office, as Plaintiff was then a member, and as known to said Glenn and Johnson, Plaintiff was then regarded as a Sheriff's Office member under investigation.

XLV.

That on Wednesday, July 28, 1999, said R. Monte MacConnell, the Sheriff's Legal Advisor, in further execution of the conspiracy to separate Plaintiff from her employment, did state and confirm Deputy Gibson was to be "terminated" as decided by the Sheriff, and did further state if Plaintiff did not resign from the Sheriff's Office, the Sheriff would want her processed with felony charges for grand theft, attempting to influence Plaintiff's decision over the right to and issue of retained employment, herein alleged to be a violation of Idaho Code, § 18-1353, as such action was intended to influence Plaintiff's decision in a pending administrative proceeding regarding the retention, resignation or termination of Plaintiff's employment.

Appendix 80

XLVI.

That Plaintiff does allege, and as a matter of law, does aver that not only was this threat of Plaintiff's termination a violation of the *Fair Labor Standards Act*, 29 U.S.C., § 215 (a) (3), but also was an attempt to thwart procedural law, as announced in Cleveland Board of Education v Loudermill, 470 US 532 (1985), wherein the U.S. Supreme Court declared a "classified" employee is entitled to a "pretermination" hearing prior to the commencement or intent of any termination proceedings. Plaintiff was never given such hearing prior to the formulated decision of termination.

XLVII.

Plaintiff had asserted her rights and was protected from any such action of termination or discrimination, under the provisions of Ada County Code, § 1-7C-1, and as mandated by the *Fair Labor Standards Act*, 29 U.S.C., § 201 *et seq.* and specifically Title 29 U.S.C., § 215 (a) (3) does state:

> "it shall be unlawful for any person (including a public agency) to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be institute any proceeding under or related to this Act, or has testified or is about to testify in any such proceeding, or ....." (Emphasis added).

XLVIII.

That Plaintiff refused to resign under this felonious threat of criminal conduct, which then forced the Sheriff to

deliver his Notice of Intent to Impose Discipline upon Plaintiff on August 2, 1999. That Plaintiff does allege, and as a matter of law, does aver that such action was pursued in violation of 29 U.S.C., § 215 (a) (3).

XLIX.

That on August 6, 1999, pursuant to Ada County Code § 1-7G-3D, Plaintiff denied the allegations contained in the Sheriff's Notice of Intent to Impose Discipline, and exercised her right to respond.

L.

That on August 11, 1999, the Sheriff's Legal Advisor identified above, did confirm receipt of correspondence, and did submit Plaintiff's July paycheck along with the "pay voucher" or "claim form", which continued to show the incorrect salary reference of $1,550.00.

LI.

That on August 9, 1999, Greg H. Bower, acting in his capacity as the Ada County Prosecutor, sent correspondence to Mr. John Christensen, acting in his capacity as Chief Criminal Prosecutor in Canyon County, Idaho, and therein said Bower did represent he was granting authorization to said Christensen "to file charges in this case...", and therein stated "I will have you appointed as special prosecutor". This communication was issued in a manner contrary to statute, and for the intended benefit of Ada County, undertaken in an effort to seek a malicious prosecution, as Plaintiff

does allege such conduct is not authorized by Idaho Code §31-2603 (a) or Title 29 U.S.C., § 201 *et seq.*; that such letter of represented "authorization" was undertaken for the direct benefit of the Ada County Sheriff, designed to carry forward the County Sheriff's threat of criminal charges as before delivered to frighten Plaintiff, constituting ongoing acts of arbitrary and discriminatory behavior, pursued for no lawful purpose.

LII.

That on August 20, 1999, Chief Criminal Deputy Canyon County Prosecutor, John Christensen, acting in his official capacity, determined criminal charges were "inappropriate"; that notwithstanding that determination, the Ada County Prosecuting Attorney, Greg H. Bower, undertook further inappropriate efforts by submitting the letter of August 25, 1999, to the Sheriff's Budget Director, announcing certain events, yet knowing said Director had no authorized right to access investigatory records, reports, or information of such classified nature.

LIII.

That on August 23, 1999, the County Sheriff Legal Advisor, identified above, requested Plaintiff to accept Administrative Leave Without Pay. Plaintiff declined that request, but agreed if, Ada County would continue all medical benefits coverage, during all periods of administrative leave, needed for the acute depression, insomnia and anxiety attacks that had resulted from this psychological injury from the County's misconduct, she would, and only then would, agree to Leave Without Pay. Plaintiff caused a letter to be sent to confirm what she would

agree to, and identified the only status of non-pay she would accept regarding Administrative Leave. That notwithstanding said letter and contrary to established County employee policy and Title 29, U.S.C., § 201 *et seq.*, the said Sheriff's Legal Advisor, acting on behalf of the Sheriff, did place Plaintiff on Administrative Leave Without Pay, and did also cause her medical benefits to be cancelled. That event was memorialized by letter of August 25, 1999, violating the express condition of Leave as set by Plaintiff, and Plaintiff does allege such action was a violation of Ada County Code, § 1-7G-3, setting forth the exact and specific conditions upon which an employee can be placed on Administrative Leave Without Pay. That said conduct by said R. Monte MacConnell was known by him to bring about a sequence of events that would prove to be devastating to Plaintiff and her family, and cause resulting injury and damage to Plaintiff, of a financial nature.

LIV.

That on October 5, 1999, after being threatened with prosecution, and placed on Administrative Leave Without Pay, and accused of false accusations of grand theft and embezzlement, and denied her right to medical benefits, the County Sheriff "ordered" Plaintiff to report to the County Jail Facility, at 1:00 p.m., to be diagnosed by the County Physician, Dr. Charles Steuart, to determine her medical state. Plaintiff did, in the company of her husband, go to the Jail Facility as "ordered", and met Dr. Steuart for a period of time as required and was paraded past other employees in the Jail, and underwent the diagnosis by Dr. Steuart, who generated his diagnosis and prognosis assessment, and confirmed Plaintiff's psychological injuries.

LV.

That at that time and while Plaintiff was paraded in the presence of other employees in the Jail Facility, Plaintiff did discover her 'inbox' had been removed, and all indicia of her employment had been eliminated from the facility prior to her diagnosis with Dr. Steuart on October 5, 1999.

LVI.

That on February 1, 2000, Ada County Payroll Department did issue a Notice of Personnel Action, then attempting to correct a portion of the error, thereby correcting the erroneous salary of $1,550.00 to indicate the correct salary of $1,575.00.

LVII.

That Plaintiff thereafter was officially deemed to be and was given terminated status on February 15, 2000, in violation of Title 29 U.S.C., § 215 (a) (3), as she was terminated only for reasons caused by the administrative error in the record keeping process, for which Plaintiff was being blamed for and held charged responsible therefor, a position and decision taken by Ada County that was contrary to law.

LVIII.

That Plaintiff thereafter hired Larry Stewart, Licensed Public Accountant, to review pay records available to Plaintiff, and said accountant did confirm various discrepancies did exist in wages and compensation due Plaintiff, both as to what was reported on her W-2 Form, and

when compared to pay vouchers, claim forms, records and pay documents generated by Ada County.

SPECIFIC ALLEGATIONS

COUNT I

LIX.

Plaintiff does re-allege each of the General Allegations set forth and contained in Paragraphs I through LVIII above, inclusive, as those said allegations were set forth and contained in full herein.

LX.

That at all times relevant to this Complaint, said Ada County and its Sheriff's Office was a public body, and was acting as an "employer" as defined by § 6-2103 (4) (a) and (5) (c), Idaho Code.

LXI.

That at all times relevant to this Complaint, said Plaintiff was an "employee" of said Ada County, and specifically Ada County Sheriff's Office as defined by § 6-2101 (3), Idaho Code.

LXII.

That at all times relevant to this Complaint, Plaintiff had established civil rights and property interests by virtue of her being classified as a permanent status employee with Ada County, who was given vested rights as did accrue to her

under her tenured status, and had the right to entitlements and to those protections afforded to her under Idaho Code, § 6-2101 *et* seq. and the *Fair Labor Standards Act* (FLSA), Title 29 U.S.C., § 201 *et seq.*, as carried into the provisions and enforced under the Ada County Personnel System, identified in § 1-7C-1 through § 1-7C-10, Ada County Code, and entitled to receive all rights, entitlements and protections that have been denied her by the Defendants herein, for which Plaintiff is entitled to be fully reinstated and be compensated for all damages incurred as a result of the wrongful actions of said Defendants.

COUNT II

LXIII.

Plaintiff does re-allege each of the General Allegations set forth and contained in Paragraphs I through LXII above, inclusive, as though said allegations were set forth and contained in full herein.

LXIV.

That on July 20, 1999, said Defendants Glenn and Johnson, upon the pretense of an internal investigation of a department member, as ordered by the Ada County Sheriff, Vaughn Killeen, did conspire to act in a manner that did compromise and deprive Plaintiff of equal protection under the law, and thereupon violate Plaintiff's rights, guaranteed to her by statute and by her vested constitutional rights, by detaining, interrogating, confronting and accusing Plaintiff of criminal acts, all of which was allowed to occur under false pretenses.

Appendix 80

LXV.

That commencing on July 20, 1999, said law enforcement officials, namely Sheriff Killeen, Glenn and Johnson, did conspire and wrongfully, unlawfully, without just cause or a factual or legal basis, and without a credible or reliable source of information to substantiate the belief Plaintiff had committed any criminal offenses, did then arbitrarily, capriciously, maliciously, and with reckless indifference, and in violation of Plaintiff's rights, choose to detain and confine Plaintiff for the purposes of interrogating, falsely accusing, intimidating, and threatening Plaintiff with criminal charges, and jail time for the purported charge of grand theft and/or embezzlement.

LXVI.

That at no time did Plaintiff engage in any acts that would constitute a factual basis for Plaintiff to be subjected to the wrongful treatment, as alleged, or to charge Plaintiff with the felonious act of grand theft or embezzlement; that at no time were the necessary elements present to establish that Plaintiff did in any manner commit a criminal act, or have any probable cause to believe any event was coupled therewith the element of any general or specific criminal intent; that at no time did any of the law enforcement Defendants herein ever come into possession of any basis, in fact or law, that would justify any basis for a decision to detain, accuse, threaten or charge said Plaintiff, and at no time was there ever in existence any good faith belief based upon any credible or reliable evidence or probable cause that a criminal act had been committed, or that an existing victim has resulted from any perceived act or falsely claimed criminal act, as alleged,

or as was threatened by said law enforcement Defendants at the time of Plaintiff's detainment, or anytime thereafter.

LXVII.

That the conspiratorial efforts to orchestrate a criminal charge was in fact being brought to the Ada County Prosecutor's Office without any factual cause, probable cause or good faith merit whatsoever, and knowing no basis existed, the case was still "conflicted" to the Canyon County Prosecutor's Office in an effort to cause charges to be filed with the Court; that the false assertions were declared "inappropriate" by the Canyon County Prosecutor's Office for the specific reasons no credible evidence, probable cause, factual basis or good faith cause existed to support the accusations, and there existed no witness or victims to support any such purported or fabricated accusation, and the apparent failure of the investigation by law enforcement officials to produce any basis to justify or sustain the detainment and filing of such false charges was only then abandoned and never pursued thereafter.

LXVIII.

That at all times known to said law enforcement officials, there did never exist any good faith basis to believe the accusations had any validity, and there was never any good faith attempt being pursued in any efforts to file felonious charges against Plaintiff, yet notwithstanding that fact, said conduct was pursued by said law enforcement Defendant officials, under their power and authority under color of State Law, and as a result thereof, did cause injury and financial loss for which Plaintiff is entitled to be fully compensated and

receive an award for all damages incurred by such wrongful conduct.

COUNT III

LXIX.

Plaintiff does re-allege each of the General Allegations set forth and contained in Paragraphs I through LXVIII above, inclusive, as though said allegations were set forth and contained in full herein.

LXX.

That as a result of the wrongful unlawful and conspiratorial actions of said law enforcement officials, including Sheriff Vaughn Killeen, Deputy Glenn and Deputy Johnson, said Plaintiff did sustain severe psychological injury, and was placed under the medical care and treatment of Dr. Stephen E. Spencer, which medical care commenced on July 22, 1999, and Plaintiff has continually been under the care of Dr. Spencer who has prescribed a series of different medications to treat the situational depression, anxiety, emotional duress, traumatic syndrome disorder, post-traumatic stress disorder, and allergic reactions to the medicinal stabilizing factors utilized in her care, treatment, diagnosis and prognosis of this inflicted condition; that Plaintiff is entitled to be fully compensated and receive an award for all damages incurred by such wrongful conduct.

COUNT IV

LXXI.

Appendix 80

Plaintiff does re-allege each of the General Allegations set forth and contained in Paragraphs I through LXX above, inclusive, as though said allegations were set forth and contained in full herein.

LXXII.

That on Wednesday, July 28, 1999, Plaintiff's counsel did have a telephone conversation with said MacConnell, Legal Advisor for the Ada County Sheriff's Office and then acting in that capacity, and during that conversation said MacConnell did want to secure a resolution of separation of Plaintiff's employment then before him because of the series of overpayments made by Ada County to the account of Stacy and John Gibson under the Direct Deposit Program; that said MacConnell stated to Plaintiff's counsel: "the Sheriff (Vaughn Killeen), wanted Deputy Gibson terminated, but if Ms. Gibson would voluntarily resign from the Ada County Sheriff's Office, that would resolve the matter, and if she refused to resign, she would immediately be processed with felony charges by the Sheriff concerning those funds deposited to that account, and as a result of that conduct, did cause further physical and psychological injury, mental pain, anguish and financial losses and expenses to occur, for which Plaintiff is entitled to be compensated for all such damages incurred as a result of the conspiracy wrongful actions of said Defendants.

COUNT V

LXXIII.

Plaintiff does re-allege each of the General Allegations set forth and contained in Paragraphs I through LXXII above,

inclusive, as though said allegations were set forth and contained in full herein.

LXXIV.

That during discussions on August 23, 1999 between the Sheriff's Legal Advisor, R. Monte MacConnell, and counsel for Plaintiff, Plaintiff was requested to accept Administrative Leave Without Pay, and in response thereto Plaintiff declined that request but did agree that as long as Plaintiff's medical benefits coverage continued, without interruption, during any period of Administrative Leave, Plaintiff would cooperate with any investigation and consent to Leave. The assurance of continuing benefit coverage was critical to Plaintiff as her health was in jeopardy as she suffered greatly as the result of the treatment she sustained by the Ada County agents and personnel on July 20, 1999, and as a result thereof did cause Plaintiff to incur medical expenses.

LXXV.

That Plaintiff caused a letter to be sent to Ada County to confirm the basis upon which Plaintiff would cooperate and endure a status of non-pay and Administrative Leave, but only upon the assurance of uninterrupted continuation of her medical coverage benefits.

LXXVI.

That notwithstanding Plaintiff's efforts to act in good faith, and extend her cooperation, the Legal Advisor, R. Monte MacConnell, acting for and on behalf of the Sheriff, ignored the good faith

resolution and disregarded Plaintiff's letter, and did immediately place Plaintiff on Administrative Leave Without Pay, and did immediately cancel Plaintiff's medical coverage benefits entirely, and effective as of August 24, 1999, as reflected in the County's letter of August 25, 1999.

LXXVII.

That the events of said cancellation and unpaid leave, undertaken by the County Sheriff's Legal Advisor, R. Monte MacConnell, acting in behalf of the Sheriff on August 24, 1999, did consequently cause Plaintiff to be classified as on Administrative Leave, Without Pay, and did result in the cancellation of all of Plaintiff's medical benefits forthwith, and the effects of which were the result of this arbitrary and capricious act undertaken in violation of Ada County Code, § 1-7G-3, which provisions therein were uniquely specific to when an employee could be placed on unpaid Leave.

LXXVIII.

That said placement of Plaintiff upon Administrative Leave Without Pay and the act of cancellation of her medical benefits, was in violation of any condition upon which Plaintiff would consider Administrative Leave without a hearing, and the action taken by the County did constitute a violation of Plaintiff's vested rights, and a willful violation of Ada County Code, § 1-7G-3, alleged above, and Plaintiff is entitled to be fully compensated and receive an award for all medical expenses and damages incurred by such wrongful conduct.

Appendix 80

LXXIX.

That as a result of this wrongful entry of Administrative Leave Without Pay, Plaintiff was denied her entitled to salaried wages for which Plaintiff has not received any of that compensation due her, and is entitled to be compensated in the sum of the accrued amount of those salaried wages for regular pay and routine overtime and holiday pay, and payment therefor is due Plaintiff.

COUNT VI.

LXXX.

Plaintiff does re-allege each of the General Allegations set forth and contained in Paragraphs I through LXXIX above, inclusive, as though said allegations were set forth and contained in full herein.

LXXXI.

That Plaintiff does allege that, as confirmed by Sergeant Johnson's report (page 7 and 8), on December 16th and 17th, 1999, Plaintiff was officially under surveillance, as officers do in criminal investigations; that such conduct could serve no lawful or legitimate purpose in the investigation of this administrative overpayment error; that these actions were intended to frighten Plaintiff, and cause her to suffer more anxiety, and encourage her to see the wisdom in accepting a course of resignation as the convenient resolution to avoid this emotional pressure; that said conduct was designed to influence Plaintiff as a sensible alternative to the ongoing anguish and harm being caused to her fragile health; that such conduct can be understood by Plaintiff to have been pursued only in the context of harassment, meant to influence Plaintiff

to resign, like the Sheriff wanted; that Plaintiff witnessed Johnson violate Idaho Code, § 18-7905 in his attempt to achieve the County's directive to get Plaintiff to quit her job; that Sergeant Johnson violated Idaho Code, § 18-2604, as was his intent to intimidate and harass Plaintiff, knowing Plaintiff was involved in a civil proceeding that would involve the *Fair Labor Standards Act*, Title 29 U.S.C., § 201 *et seq.*; that Plaintiff does allege, and as a matter of law, Ada County Code, § 1-7A-2A and § 1-7A-2B does prohibit discrimination and harassment of an employee in any form, and as a result of such conduct, did cause Plaintiff emotional trauma and mental anguish, compounding the injury and add to financial stress and loss for which Plaintiff is entitled to be fully compensated and receive an award for all damages incurred by such wrongful conduct.

COUNT VII

LXXXII.

Plaintiff does re-allege each of the General Allegations set forth and contained in Paragraphs I through LXXXI above, inclusive, as though said allegations were set forth and contained in full herein.

LXXXIII.

That pursuant to Title 29, U.S.C. § 215 (a) (3), said Defendants, Ada County, and its Sheriff's Office, have conspired to discriminate against Plaintiff throughout their entire engagement, once the overpayment error was discovered by the County, and Defendants have violated Plaintiff's rights, as were established upon her effective employment date of July 10, 1997, as was afforded to Plaintiff

under the Federal *Fair Labor Standards Act* (FLSA), 29 U.S.C. § 201 *et seq.* The County has violated Ada County Codes, State, and Federal Laws on a variety of issues of compensation, undue influence and duress, threat and extortive conduct, harassment, discrimination, and arbitrary and capricious conduct, which ultimately culminated in the deliberate and wrongful separation and termination of her employment, and has deprived Plaintiff of her entitlements to wages and benefits due to her under her classified employment with the Ada County Sheriff's Office, as funded and controlled by Ada County.

LXXXIV.

That in support of this ongoing discriminatory conduct, from July 20, 1999, through the current date, only Plaintiff has been terminated, and each of the three (3) Ada County employees who were involved in the creation and perpetuation of the administrative overpayment error that resulted in the deposit of funds under the County's direct deposit system to Plaintiff's joint checking account, are still employed with Ada County in the same positions they had when the administrative error was created. That none of these employees were interrogated, exposed to undue influence or duress, threatened, harassed or terminated, or ever threatened to resign, ordered to attend meetings, placed under surveillance, or threatened with being charged criminally as a result of their actual and known involvement.

LXXXV.

That the retained employment of those employees directly responsible for the administrative overpayment error does constitute a policy of arbitrary, capricious, and discriminatory conduct, imposed within the administration of Ada County

classified employees by the Sheriff's Office, and a violation of FLSA.

LXXXVI.

That the reckless indifference and discriminatory conduct of these said Defendants did serve to deprive Plaintiff of certain vested rights, privileges and immunities secured to her by the Constitution of the United States of America, including the following:

a. The right to be secure in her person and effects against unreasonable detention of her person under the Fourth and Fourteenth Amendments to the Constitution.

b. The right to be free from detention or interference with her right of freedom guaranteed to her under the Sixth and Fourteenth Amendments to the Constitution.

c. The right to be free to pursue her life, liberty and pursuit of happiness, and not to be deprived of same without due process of law, founded upon a factual and lawful basis, under due process of law, with equal protection extended to her under the law, as provided for under the State of Idaho Constitution, and by the Fourteenth Amendment to The United States Constitution.

LXXXVII.

That as a result of these acts of indifference and discriminatory conduct, Plaintiff is entitled once again to be

fully compensated and receive an award for all damages incurred as a result of such wrongful conduct.

COUNT VIII

LXXXVIII.

Plaintiff does re-allege each of the General Allegations and Specific Allegations set forth and contained in Paragraphs I through LXXXVII above, inclusive, as though said allegations were set forth and contained in full herein.

LXXXIX.

That because of the actions taken by all said Defendants, all of which occurred in the absence of any reason, justification, reasonable or probable cause, or credible or reliable evidence, and pursued in violation of the *Fair Labor Standards Act*, §§ 215 (a) (3) and 215 (a) (5), and 42 U.S.C., § 1985, Defendants did cause to result the false accusations against Plaintiff contained in Sheriff Killeen's Notice of Intent to Discipline Plaintiff, which consequential effect was to cause Plaintiff to be terminated from her employment as was officially declared on February 15, 2000.

XC.

That at no time throughout any of the proceedings did there exist any good faith basis to justify the resulting investigation, interrogation, and attempted efforts to file criminal charges, and Plaintiff does allege all such acts were pursued without any probable cause, as was done, or pursued by said law enforcement officials identified above, under their unique power and authority vested in them under color of State Law.

Appendix 80

XCI.

That by reason of said wrongful acts identified above, including the detention, interrogation and attempted malicious prosecution, threats, administrative leave, cancellation of medical benefits and ongoing surveillance, and discriminatory activity, Plaintiff was required to secure the assistance of counsel, to secure the necessary legal representation to assist in addressing the false accusations, attempted malicious prosecution and mitigate Plaintiff's ongoing damages from these constitutional deprivations; that notwithstanding the false, malicious and capricious charges, attempts at malicious prosecution, pursued without probable cause, Plaintiff was caused to suffer the eventual termination from her employment, and Plaintiff has consequently suffered severe and irreparable health problems and financial losses, from such wrongful conduct; that throughout these events, Plaintiff has suffered great emotional and mental anguish, personal humiliation, resulting financial hardship, and deprivation of her constitutional right to life, liberty, happiness, state of tranquility, and peace of mind, and has suffered to endure an impugned character in the formation of these false charges and judicial proceedings, causing extreme stress to her and her family, of a significant concern, and by virtue thereof, Plaintiff has suffered a series of actual, special and general damages, substantial in nature, and does continue to suffer the emotional effects of these wrongful events, all of which has now become a matter of post-traumatic stress, coupled with the need for continued medical treatment, and Plaintiff does claim a right to recover for all of her actual, special and general damages, for all acts and conduct alleged in each cause of action in these pleadings, together with all costs and attorney fees incurred by Plaintiff, which damages are in excess of $10,000.00.

Appendix 80

WHEREFORE, Plaintiff does pray for Judgment against all said Defendants as follows:

1. Plaintiff does reserve the right to file an amended complaint, once the true names and identities of any other law enforcement officials become known to Plaintiff, as allowed by Rule 10 (a) (4), I.R.C.P.

2. For recovery of all actual, special and general damages resulting from the wrongful acts and conduct committed by said Ada County, its Sheriff's Office, and the law enforcement official Defendants, Vaughn Killeen, R. Monte MacConnell, Arville Glenn and Scott Johnson, acting under color of State Law and in behalf of said Ada County and its Sheriff's Office, and all actual, special, and general damages resulting from the wrongful conduct of all said Defendants as alleged in Counts I through VIII, inclusive. Plaintiff does allege her damages do well exceed the jurisdictional limits of $10,000.00 of the Magistrate Court of this state, and this action is within the jurisdiction of the District Court.

3. For recovery of all costs, expenses and attorney fees as was incurred, and as may be incurred by her in this action and provided for in accordance with the statutes of Idaho (Idaho Code, § 6-2101 *et seq.*), the provisions of Title 42 U.S.C., §§ 1981, 1983 and 1985 (3) and by virtue of Rule 54, I.R.C.P.

4. For such other and further relief as this Court may deem just and proper in the premises.

Appendix 80

5. PLAINTIFF DEMANDS A JURY TRIAL ON ALL ISSUES TRIABLE TO A JURY.

Dated this 19th day of July 2002.

/s/ Vernon K. Smith
Vernon K. Smith
Attorney for Plaintiff

STATE OF IDAHO)
: ss
County of Ada)

Stacy A. Gibson, being first duly sworn upon oath, deposes as follows: That I am the Plaintiff in the above entitled action; that I have read the above and foregoing Complaint; know the contents thereof; and the facts therein stated I believe to be true.

/s/ Stacy A. Gibson
Stacy A. Gibson
Plaintiff

SWORN AND SUBSCRIBED TO Before me this 19th day of July 2002.

/s/ Vernon K. Smith
[SEAL] Notary Public for Idaho
Residing at Boise, Idaho
My Commission Expires: 12/20/06

APPENDIX 81 – MEMORANDUM DECISION AND ORDER ENTERED BY THE U.S. DISTRICT COURT, MARCH 1, 2006

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

Case No. CV05-263-S-EJL

MEMORANDUM DECISION AND ORDER

Filed: March 1, 2006

STACY A. GIBSON,

Petitioner,

v.

ADA COUNTY, et al,

Respondents.

Pending before the Court in the above-entitled matter are Defendants' motion to dismiss, Plaintiff's motion for summary judgment, and related motions. The motions have been fully briefed and are now ripe for the Court's review. Having fully reviewed the record herein, the Court finds that the facts and legal arguments are adequately presented in the briefs and record. Accordingly, in the interest of avoiding further delay, and because the Court conclusively finds that the decisional process would not be significantly aided by oral argument, these motions shall be decided on the record before this Court without oral argument. Local Rule 7.1(d)(2).

Appendix 81

Factual and Procedural Background

On July 5, 2005, Plaintiff Stacy A. Gibson filed a complaint alleging civil rights violations pursuant to 42 U.S.C. § 1983 seeking compensatory, consequential, and punitive damages. (Dkt. No. 1). The complaint alleges Ms. Gibson was denied her right to procedural due process, equal protection, and right to judicial access by Defendants Ada County, Ada County Board of Commissioners, Ada County Sheriff's Office, and employees and/or agents of Ada County (collectively "Ada County"). Generally the claims relate to a dispute over Ms. Gibson's payroll receipts and ultimately her termination of employment as an Ada County Sheriff's Office Jail Technician. Ms. Gibson alleges Ada County denied her rights and entitlements to pursue due process, administrative review procedures, and access to the courts so as to prevent her from challenging the allegations regarding her employment and termination. Ms. Gibson claims the Defendants' continual denial of her due process rights cumulated in the final decision by the Ada County Board of Commissioners denial of her request for administrative review on July 2, 2003. It is from this final decision that Ms. Gibson alleges her clause of action before this Court arises and when she knew or had reason to know of her injury. Ms. Gibson also acknowledges in her complaint that there are three cases pending on appeal before the Idaho Supreme Court involving similar parties but different claims. The Idaho Supreme Court, however, has recently resolved those appeals in favor of Defendants. Gibson v. Ada County, et al., ___ P.3d ___, 2006 WL 299061 (Idaho 2006).

Appendix 81

Standard of Law

1) 12(b)(1):

A Defendant may move to dismiss a complaint for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1) in one of two ways. See Thornhill Publ'g Co., Inc. v. General Tel. & Elec. Corp., 594 F.2d 730, 733 (9th Cir. 1979)). The attack may be a "facial" one where the defendant attacks the sufficiency of the allegations supporting subject matter jurisdiction. Id. On the other hand, the defendant may launch a "factual" attack, "attacking the existence of subject matter jurisdiction in fact." Id. When considering a "facial" attack made pursuant to Rule 12(b)(1), a court must consider the allegations of the complaint to be true and construe them in the light most favorable to the plaintiff. Love v. United States, 915 F.2d 1242, 1245 (9th Cir. 1988). A "factual" attack made pursuant to Rule 12(b)(1) may be accompanied by extrinsic evidence. St. Clair v. City of Chico, 880 F.2d 199, 201 (9th Cir. 1989); Trentacosta v. Frontier Pac. Aircraft Indus., 813 F.2d 1553, 1558 (9th Cir. 1987). When considering a factual attack on subject matter jurisdiction, "the district court is ordinarily free to hear evidence regarding jurisdiction and to rule on that issue prior to trial, resolving factual disputes where necessary." Augustine v. United States, 704 F.2d 1074, 1077 (9th Cir. 1983) (citing Thornhill, 594 F.2d at 733). "[N]o presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims ." Thornhill, 594 F.2d at 733 (quoting Mortensen v. First Fed. Sav. & Loan Ass'n, 549 F.2d 884, 891 (3d Cir. 1977)).

However, "[t]he relatively expansive standards of a 12(b)(1) motion are not appropriate for determining jurisdiction ... where issues of jurisdiction and substance are intertwined. A court may not resolve genuinely disputed facts where 'the question of jurisdiction is dependent on the resolution of factual issues going to the merits.'" Roberts v. Corrothers, 812 F.2d 1173, 1177 (9th Cir. 1987) (quoting Augustine, 704 F.2d at 1077). In such a case, "the jurisdictional determination should await a determination of the relevant facts on either a motion going to the merits or at trial." Augustine, 704 F.2d at 1077 (citing Thornhill, 594 F.2d at 733-35). This case does not require the Court to resolve substantive issues in determining whether jurisdiction is proper.

2) 12(b)(6):

In considering a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), "all well-pleaded allegations of material fact are taken as true and construed in a light most favorable to the non-moving party." Wyler Summit P'ship v. Turner Broad. Sys., Inc., 135 F.3d 658, 661 (9th Cir. 1998) (citation omitted). However, the court does not necessarily assume the truth of legal conclusions merely because they are cast in the form of factual allegations in plaintiff's complaint. See Clegg v. Cult Awareness Network, 18 F.3d 752, 754-55 (9th Cir. 1994). There is a strong presumption against dismissing an action for failure to state a claim. See Gilligan v. Jamco Dev. Corp., 108 F.3d 246, 249 (9th Cir. 1997) (citation omitted). "'The issue is not whether a plaintiff will ultimately prevail but whether [he] is entitled to offer evidence in support of the claims.'" Id. (quoting Scheuer v. Rhodes, 416 U.S. 232, 236 (1974), *overruled on other*

grounds by Harlow v. Fitzgerald, 457 U.S. 800, 807 (1982)). Consequently, the court should not grant a motion to dismiss "for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46, (1957); see also Hicks v. Small, 69 F.3d 967, 969 (9th Cir. 1995). A claim is sufficient if it shows that the plaintiff is entitled to any relief which the court can grant, even if the complaint asserts the
wrong legal theory or asks for improper relief. See United States v. Howell, 318 F.2d 162, 166 (9th Cir. 1963).

Analysis

Defendants' motion to dismiss asserts the complaint should be dismissed in its entirety based on the Rooker-Feldman Doctrine, issue/claim preclusion, and the statute of limitations. In addition Defendants seek costs and attorney fees. Ms. Gibson opposes the motion arguing her claim before this Court is timely filed and distinct from the issues raised before the state court.

1) Issue/Claim Preclusion:

Defendants argue the claims raised in the complaint are precluded by *res judicata* and/or collateral estoppel because they have already been litigated in state court. Ms. Gibson maintains the state court matters are not the same "substance or subject matter of her claimed injury in this Federal suit, as those actions preceded the accrual of this Federal subject matter constitutional violation raised in this suit." (Dkt. No. 8, p. 2). In particular, Ms. Gibson notes the state court matters involve events preceding the July 2, 2003 denial by the Ada County Board of Commissioners of her request for

administrative review; from which Ms. Gibson argues her federal claims arise. This denial, she claims, resulted in "a new civil rights violation, creating a new cause of action" and is the final overt act of continuing misconduct resulting in damages for which she now seeks relief. Thus, Ms. Gibson concludes that the cause of action alleged here has "never been raised as a cause of action and prayer for a damage claim" in any of the state court cases which concern earlier constitutional violations. (Dkt. No. 8, p. 7).[1] In reply, Defendants' point out that one of Ms. Gibson's state court cases was filed on July 30, 2003, after the July 2, 2003 denial which she claims gives rise to her federal cause of action now before this Court.

Section 1983 actions must afford full faith and credit to state judicial proceedings such that *res judicata* and other preclusion doctrines may operate to limit or exclude causes of action in federal court. See Strong v. Department of Correction, 2006 WL 47358 *2 (D. Idaho 2006) (citations omitted). "To determine whether a state judgment should have preclusive effect in a federal action, federal courts apply the state's rules governing preclusion." Id. (citation omitted). The Idaho Supreme Court has stated that "*Res judicata* is comprised of claim preclusion (true *res judicata*) and issue preclusion (collateral estoppel). Under principles of claim preclusion, a valid final judgment rendered on the merits by a court of competent jurisdiction is an absolute bar to a subsequent action between the same parties upon the same claim." Lohman v. Flynn, 78 P.3d 379, 386 (Idaho 2003)

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[1] Ms. Gibson also notes that the state court cases were not "final" judgments as the state Supreme Court had not yet issued a decision. Since the time of the filing of her response brief, however, the state Supreme Court has issued a decision in favor of Defendants in those cases.

(citations omitted); see also Coeur d'Alene Tribe v. Asarco Inc., 280 F.Supp.2d 1094, 1117-19 (D. Idaho 2003) ("Although the literal definition of the term *res judicata* is expansive enough to cover both preclusion of relitigation of the same cause of action and relitigation of the same issue, the modern tendency is to refer to the aspect of the doctrine that precludes relitigation of the same issue in a separate cause of action as collateral estoppel, and to refer to that aspect preventing relitigation of the same cause of action as *res judicata*.") (quotations and citations omitted)).

"*Res judicata* thus applies to protect litigants from the burden of litigating the same cause of action with the same party or its privity." Coeur d'Alene Tribe, 280 F.Supp.2d 1094, 1117-19 (D. Idaho 2003) (citing Hindmarsh v. Mock, 57 P.3d 803 (Idaho 2002)). *Res judicata* "bars not only subsequent relitigation of a claim previously asserted, but also subsequent relitigation of any claims relating to the same cause of action which were actually made or which might have been made. Lohman, 78 P.3d at 386 (citing Hindmarsh, 57 P.3d at 805 (citations omitted)). For *Res judicata* to preclude litigation the following requirements must be met: (1) the same claim or cause of action arising out of the same facts must be involved in both suits; (2) there must be a final judgment on the merits in the prior action; and (3) the parties in the instant action must be the same as or in privity with the parties in the prior action in question. Coeur d'Alene Tribe, *supra* (citations omitted). "The purposes of these judicially created rules are to conserve judicial resources, protect

litigants from multiple lawsuits, and foster certainty and reliance in legal relations." Id. (citation omitted).[2]

As to collateral estoppel, the Idaho Supreme Court has delineate five factors that "must be considered in determining whether collateral estoppel will act as a bar":

> 1) the party against whom the earlier decision was asserted had a full and fair opportunity to litigate the issue decided in the earlier case; 2) the issue decided in the prior litigation was identical to the issue presented in the present action; 3) the issue sought to be precluded was actually decided in the prior litigation; 4) there was a final judgment on the merits in the prior litigation; and 5) the party against whom the issue is asserted was a party or in privity with a party to the prior litigation.

Lohman, 78 P.3d at 386 (citation omitted).

The complaint filed here presents the same claims, arguments and issues as those raised in the state court causes

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[2] The Idaho Supreme Court has recognized that the three fundamental purposes served by *res judicata* are:

First, it "[preserves] the acceptability of judicial dispute resolution against the corrosive disrespect that would follow if the same matter were twice litigated to inconsistent results." Second, it serves the public interest in protecting the courts against the burdens of repetitious litigation; and third, it advances the private interest in repose from the harassment of repetitive claims. The doctrine of claim preclusion bars not only subsequent relitigation of a claim previously asserted, but also subsequent relitigation of any claims relating to the same cause of action which were actually made or which might have been made. Lohman, 78 P.3d at 386.

of action. This is evident from the pleadings and briefings filed in the state court matters cumulating with the Idaho Supreme Court's recent decision on those cases and the record in this case. In her briefing here, Ms. Gibson argues the state court matters are distinct in that they affect issues of employee rights, privileges, protections, and guarantees under FLSA but do not address due process and equal protection as to the July 2, 2003 denial by the Board of Commissioners. Further, Ms. Gibson claims that the state court matters do not seek a claim for damages nor cause of action for due process and equal protection violations occurring as a result of the July 2, 2003 denial. These distinctions are untenable. The Idaho Supreme Court's opinion acknowledged that Ms. Gibson's complaint does not specifically allege due process but stated "this does appear to be part of her argument on appeal. She maintains that the Board's refusal to grant review of the hearing officer's decision constitutes an ongoing deprivation of her due process rights." Gibson v. Ada County, *et al.*, 2006 WL 299061*7. This is the very issue raised here. The fact that her argument has been raised and litigated, is particularly evident from Ms. Gibson's position here that while the July 2, 2003 event gives rise to her "new" claim, Ms. Gibson maintains that this "new" claim includes the conduct of all Defendants for all previous ongoing misconduct as it is all continual violations of her due process; thus incorporating the entirety of her claims previously raised. It is clear from the pleadings, briefing, and records and, in particular, the Idaho Supreme Court's opinion, that the position pursued by Ms. Gibson here incorporates and is the same as that taken, argued, and fully litigated in the state court.

Appendix 81

There has been final judgments on the merits as to the issues raised in each of those state cases. See Gibson v. Ada County, *et al.*, ___ P.3d ___, 2006 WL 299061 (Idaho 2006). The question then becomes whether there was there privity between Ms. Gibson and the Defendants in this matter. "Even when the parties are not identical, privity may exist if there is substantial identity between parties, that is, when there is sufficient commonality of interest." Coeur D'Alene Tribe v. Asarco Inc., 280 F.Supp.2d 1094, 5117-19 (D. Idaho 2003) (quotations and citations omitted) (also citing Stratosphere Litigation, 298 F.3d at 1142 n. 3 (finding privity when a party is "so identified in interest with a party to former litigation that he represents precisely the same right in respect to the subject matter involved") (citation omitted); Shaw v. Hahn, 56 F.3d 1128, 1131-32 (9th Cir.1995) (finding privity when the interests of the party in the subsequent action were shared with and adequately represented by the party in the former action); United States v. ITT Rayonier, Inc., 627 F.2d 996, 1003 (9th Cir. 1980) ("[A] 'privy' may include those whose interests are represented by one with authority to do so."). "[P]rivity is a flexible concept dependent on the particular relationship between the parties in each individual set of cases." Coeur d'Alene Tribe, *supra*. "[A] relationship of privity can be said to exist when there is an 'express or implied legal relationship by which parties to the first suit are accountable to non-parties who file a subsequent suit with identical issues.'" Id. (quoting In re Schimmels, 127 F.3d at 881 and citing Alpert's Newspaper Delivery Inc. v. N.Y. Times Co., 876 F.2d 266, 270 (2d Cir. 1989) ("The issue is one of substance rather than the names in the caption of the case; the inquiry is not limited to a traditional privity analysis.") (citations omitted).

Privity between the parties exists here. Ms. Gibson is a party to each of the suits filed in state court and in this matter. Likewise, Ada County and the Ada County Sheriff's Office were expressly named in the state cases and are named here. The Ada County Board of Commissioners, however, were not named in some the state cases but are named as Defendants in the suit before this Court. The inclusion of the Ada County Board of Commissioners does not leave the claim wanting for privity as there is a "sufficient commonality of interest" between the Defendants named in the state court actions and those named in the complaint filed here. Moreover, the Ada County Board of Commissioners was part of Ms. Gibsons' state court action seeking judicial review of the Board's decision denying her request for a hearing. See (Dkt. No. 7, Ex. C) (Gibson v. Ada County, Fourth District Court Case No. CV OC 0305850D, filed July 30, 2002). In that action the state court denied her petition for judicial review because, as a matter of law, "[t]here exists no statute or constitutional authority under Idaho law allowing a Board of County Commissioners to review the personnel decisions of other elected County officers." Id. This ruling was upheld by the Idaho Supreme Court. See Gibson v. Ada County, ___ P.3d ___, 2006 WL 299061 *9 (Idaho 2006).

Because the claims and issues presented here were previously raised, argued, and finally decided on the merits in the prior state court actions between these same parties and/or those in privity, they are precluded and the motion to dismiss shall be granted.

2) Statute of Limitations:

The statute giving rise to Ms. Gibson's cause of action, 42 U.S.C. §1983, does not contain its own statutes of limitations,

"so courts borrow the most appropriate state statute of limitations." Cholla Ready Mix, Inc. v. Civish, 382 F.3d 969, 974 (9th Cir. 2004) (citation omitted). Section 1983 actions, therefore, apply the statute of limitation applicable to personal injury claims. Id. (citing Wilson v. Garcia, 471 U.S. 261, 268, 276-80 (1985)). The parties do not dispute that the applicable statute of limitations here is promulgated in Idaho Code § 5-219(4) which provides a two year statute of limitation on personal injury claims. See Henderson v. State, 715 P.2d 978, 981 (Idaho 1986). The issue in this matter is whether the last overt act giving rise to the claim occurred on July 2, 2003, as Ms. Gibson argues, or whether it occurred outside the two year window as Defendants contend.

"In applying the statute of limitations to the case at bar...federal law determines the 'last act' for purposes of tolling a state's statute of limitations." Henderson, 715 P.2d 981 (citing Briley v. State of California, 564 F.2d 849, 855 (9th Cir. 1977)). "The generally accepted rule for ascertaining the 'last act' is provided in Cox v. Stanton, 529 F.2d 47, 50 (1975) [which states]: Federal law holds that the time of accrual [of a civil rights claim] is when plaintiff knows or has reason to know of the injury which is the basis of the action." Id.

Defendants argue Ms. Gibson's § 1983 claim was known or should have been known no later than February 15, 2000 when the Ada County Personnel Hearing Officer affirmed the Ada County Sheriff's decision to terminate her employment. Ms. Gibson maintains that the last act for purposes of the statute of limitations on her claim here was the Ada County Board of Commissioners' denial of her request for review on July 2, 2003. The Idaho Supreme Court recently determined that Ms. Gibson's § 1983 claim filed in one of her state court

actions began on February 15, 2000. Gibson v. Ada County et al., ___ P.3d ___, 2006 WL 299061 *8 (Idaho 2006). The § 1983 claim before the state court involved Ms. Gibson request for judicial review of Ada County's decision to terminate her employment. Before the Idaho Supreme Court, Ms. Gibson argued that the statute of limitations was tolled while she exhausted her administrative remedies and that the last act occurred on July 2, 2003 when the Board of Commissioners refused her request. Id. at *5.

Having reviewed the record, this Court concludes that Ms. Gibson either knew or should have known of the injury giving rise to her § 1983 cause of action on February 15, 2000. This is evidenced by the complaint itself. Though the complaint couches the claim as one arising from the July 2, 2003 action of the Board of Commissioners, as distinct from the state claim which involved events prior to that date, Ms. Gibson's arguments before the Idaho Supreme Court were the same as those she has raised here involving the July 2, 2003 Board of Commissioners Decision. Further, Ms. Gibson's knowledge of her claims prior to July 2, 2003 is evident in the multiple law suits pursued in state court asserting these same claims and allegations against many of the same parties well prior to the filing of this law suit. Further, the complaint asserts that the all of the prior alleged violations are also incorporated in the claim and a basis upon which Ms. Gibson seeks recovery. To adopt Ms. Gibson's argument would allow the complaining party to simply decide when the statute of limitations begins. Such reasoning goes against the purpose of having a statute of limitations and result in the statute of limitations being tolled indefinitely until the complaining party decides to file suit. Quite simply, repeated requests for review and repeated denials do not equate to tolling for

purposes of the statute of limitations. Ms. Gibson's complaint in this matter is untimely and barred by the two year statute of limitations. Accordingly, the Defendants' motion to dismiss is granted.

3) Costs and Attorney Fees:

Defendants' motion also includes a request for costs and attorney fees pursuant to § 1988 arguing Plaintiff's complaint is "frivolous, unreasonable, or without foundation." (Dkt. No. 7, p. 13). Ms. Gibson argues her claims are genuine and meritorious again noting that the issues raised here are separate from those in the state court matters. In particular, Ms. Gibson notes that the Ada County Board of Commissioners are named as Defendants in this matter and were not named in the state court actions. Defendants' assert the complaint in this action is merely the continuation of the same dispute between the parties and is precluded and in violation of the statute of limitations.

While the prevailing party in a § 1983 suit may recover attorney fees pursuant 42 U.S.C. § 1988(b), a prevailing defendant in a § 1983 suit should be awarded attorney fees only when the action is "unreasonable, frivolous, merciless, or vexatious." Vernon v. City of Los Angeles, 27 F.3d 1385, 1402 (9th Cir. 1994). An "award of fees under § 1988 to a prevailing defendant is unusual because the policy reasons behind the award of fees to a prevailing plaintiff are not present when a defendant prevails. A district court in its discretion, however, may award a defendant in a civil rights suit attorneys' fees under § 1988 when a 'plaintiff's action was frivolous, unreasonable, or without foundation.'" Muzquiz v. W.A. Foote Memorial Hosp., Inc., 70 F.3d 422,

432 (6th Cir. 1995) (citation omitted). In deciding this issue, the Ninth Circuit has found the "authority addressing the award of attorney fees and costs to defendants under Title VII or 42 U.S.C. § 1988 to be instructive...[i]n setting out the 'frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith' standard" In Christiansburg Garment Co., the Supreme Court provided the following caveat:

> In applying these criteria, it is important that a district court resist the understandable temptation to engage in post hoc reasoning by concluding that, because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation. This kind of hindsight logic could discourage all but the most airtight claims, for seldom can a prospective plaintiff be sure of ultimate success. No matter how honest one's belief that he has been the victim of discrimination, no matter how meritorious one's claim may appear at the outset, the course of litigation is rarely predictable. Decisive facts may not emerge until discovery or trial. The law may change or clarify in the midst of litigation. Even when the law or the facts appear questionable or unfavorable at the outset a party may have an entirely reasonable ground for bringing suit.

434 U.S. at 421-22. In this case, although the Court has granted the motion to dismiss, Plaintiff's claim appears to have been made with the genuine belief that it raised a new cause of action under § 1983 for due process violations. To that end Plaintiff brought her § 1983 claim to this Court in an effort to challenge the process which she argues she was

entitled to and denied by Defendants. The Court, while not agreeing with Plaintiff's theory, does not conclude that the claim was frivolous or unreasonable.

4) Other Motions:

As the Court's ruling granting Defendants' motion to dismiss is dispositive of this matter, all other pending motions are deemed moot. (Dkt. No. 9, 17, 20, 29). As to Defendants' motions to strike, the Court also finds those motions to be moot. (Dkt. No. 13, 27).

ORDER

Based on the foregoing and being fully advised in the premises, the Court **GRANTS IN PART AND DENIES IN PART** Defendants' Motion to Dismiss (Dkt. No. 7). The motion is granted as to the dismissal of all claims in the complaint against all Defendants. The motion is denied as to the request for attorney fees. The remaining motions (Dkt. Nos. 9, 13, 17, 20, 27, and 29) are **DEEMED MOOT**.

DATED: **February 28, 2006**

[SEAL]

/s/ Edward J. Lodge
Honorable Edward J. Lodge
U.S. District Judge

APPENDIX 82 – JUDGMENT ENTERED BY THE U.S. DISTRICT COURT, MARCH 1, 2006

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

Case No. CV05-263-S-EJL

JUDGMENT

Filed: March 1, 2006

STACY A. GIBSON,

Petitioner,

v.

ADA COUNTY, et al,

Respondents.

Based upon this Court's Memorandum Decision and Order, dated February 28, 2006, and the Court being fully advised in the premises;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Plaintiff take nothing from the Defendants and this case is **DISMISSED IN ITS ENTIRETY.**

DATED: **February 28, 2006**

[SEAL]

/s/ Edward J. Lodge
Honorable Edward J. Lodge
U.S. District Judge

APPENDIX 83 – LETTER FROM GIBSON'S COUNSEL TO THE SHERIFF, PROSECUTING ATTORNEY, AND HUMAN RESOURCE DIRECTOR, DATED AUGUST 6, 1999, DENYING ALL ACCUSATIONS, ENTITLEMENT TO LEAVE, WITH PAY, ANNOUNCING GIBSON'S MEDICAL CONDITION, AND DEMANDING PRE-TERMINATION HEARING

August 6, 1999

Ada County Sheriff's Office
7200 Barrister Dr.
Boise, Idaho 83704

ATTN: Vaughn Killeen
Ada County Sheriff

Ada County Prosecutor's Office
602 W. Idaho St.
Boise, Idaho 83702

ATTN: Greg Bower
Ada County Prosecuting Attorney

Ada County Sheriff's Personnel Director
7200 Barrister
Boise, Idaho 83704

ATTN: Bethany Calley

Ada County Director of Human Resources
650 Main St., 3rd Floor
Boise, Idaho 83702

ATTN: Terry Johnson

Appendix 83

RE: Response to Notice of Intent to Impose Discipline
Employee: Deputy Stacy Gibson
Employee #: 54224
Social Security #: 518-78-2239
Employer Position: Ada County Jail Technician

Dear Messrs. Killeen, Bower, Johnson and Calley:

On August 2, 1999, a formal notice of Sheriff Killeen's Intent to Terminate Ms. Gibson as an Ada County Deputy Sheriff was issued and served upon Ms. Gibson, through her attorney, Vernon K. Smith, therein stating that said action was being taken as it was believed she had violated Ada County Code Provision, Section 1-7G-3.A(5), and by virtue of that allegation, had thereby violated Section 9.04, of the Ada County Sheriff's Department Policy Manual.

Essentially, the specific acts alleged as a basis for imposing such discipline of termination is her receipt of payment in excess of the position salary, an event occurring for approximately eight months as a result of an error in the Payroll Department, and it is now being claimed she purportedly knew of the overpayment and failed to notify the Sheriff's Office of the payment error, or otherwise take such effort so as to correct the overpayment or repay the funds to the County.

Ms. Gibson does deny the commission of any act that would suggest or support the allegation of wrongful conduct or demonstrate a willful violation of the Ada County Personnel Code, the Ada County Sheriff's Office Policy Manual or any provisions of the Statutes of the State of Idaho.

We do request a hearing, to which the employee is entitled, pursuant to this Notice of Intent to Terminate, and in the interim she does understand that she will be placed on

Appendix 83

administrative leave, with pay, until a written decision has been rendered following this reply and a hearing and disposition thereafter. We will await further notification of a hearing date, and we would appreciate sufficient time, as Ms. Gibson is currently on medical leave as a result of the traumatic and emotional impact created by the confrontational and accusatory actions taken against her by the Ada County Sheriff personnel, and their direct verbal assault that she committed wrongful or unlawful conduct in the course of her employment as a result of the County's own error in creating this overpayment situation, apparently originating in the Accounting Department.

We again request immediate delivery of a copy of the interview tapes taken during this investigation-interrogation process, and would again request a full accounting of payroll record prior to our participation in this Disciplinary Hearing.

We await further response on this hearing, and until then, we remain,

Yours very truly,

/s/ Vernon K. Smith
Vernon K. Smith

/s/ Stacy Gibson
Stacy Gibson

FILED
NOV 24 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

(7)

No. 06-233

IN THE

Supreme Court of the United States

STACY A. GIBSON,

Petitioner,

v.

ADA COUNTY, *et al*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IDAHO

PETITION FOR REHEARING

Vernon K. Smith
1900 W. Main Street
Boise, Idaho 83702
(208) 345-1125

Attorney for Petitioner

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS.....	i
CERTIFICATION OF COUNSEL.....	ii
TABLE OF CITED AUTHORITIES.....	iii
PETITION FOR REHEARING.....	1
INTERVENING CIRCUMSTANCES.....	1
ARGUMENT.....	4
CONCLUSION.....	10

CERTIFICATION OF COUNSEL

Pursuant to Rule 44 of the U.S. Supreme Court, I hereby certify the attached Petition For Rehearing is not presented for delay, is restricted to the grounds specified in Rule 44(2), and presented in good faith.

November 24, 2006

Vernon K. Smith

Attorney For Petitioner

TABLE OF CITED AUTHORITIES

Page

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Case No. 05-C-661, United States District Court,
E.D. Wisconsin, September 11, 2006..... 6

Belas v. Juniata County School Dist.,
Civil Action No. 1:CV-04-505, United States District
Court, M.D. Pennsylvania, August 26, 2005..... 6

Carey v. Piphus,
435 U.S. 247, 259 (1978)..... 5

Cleveland Board of Education v. Loudermill,
470 U.S. 532, 105 S.Ct. 1487 (1985)..... 3, 8

Cotton v. Jackson,
216 F.3d 1328, at 1331 (11th Cir. 2000)..... 6

Day v. Borough of Carlisle,
Civil Action No. 1:CV-04-1040, United States
District Court, M.D. Pennsylvania, July 10, 2006..... 6, 7

Gibson v. Ada County, et al.,
142 Idaho 746, 133 P.3d 1211 (2006)..... 1, 4

Gibson v. Ada County, et al.,
CV05-263-S-EJL,
U.S. District Court, Idaho, March 1, 2006..... 9

Gibson v. Ada County, et al.,
06-35600, 9th Circuit Court of Appeal..... 1

Gilbert v. Homar,
520 U.S. 924 (1997)..... 3

Hansen v. White,
947 F.2d 1378 (9th Cir. 1991)..... 9

Table Of Cited Authorities

Page

Hansen v. White,
114 Idaho 907, 762 P.2d 820 (1988)..... 9, 10

Hicks v. Jackson County Commission,
Civil Action No. CV-03-S-2858-NE,
United States District Court, N.D. Alabama,
Northeastern Division, June 23, 2005..... 8

Homar v. Gilbert,
89 F.3d 1009 (3rd Cir. 1996)..... 3

Horton v. Bd., Cnty. Com'rs, Flagler Cnty.,
202 F.3d 1297 (11th Cir. 2000)..... 6

Jackson v. City of Stone Mountain,
232 F.Supp.2d 1337, at 1368 (N.D. Ga. 2002)..... 6

Kildare v. Saenz,
325 F.3d 1078 1085-1086 ((9th Cir. 2003)..... 6

Koltonuk v. Borough of Laureldale,
Civil Action No. 05-0106, United States District Court,
E.D. Pennsylvania, July 18, 2006..... 6

McDaniels v. Flick,
59 F.3d, at 461 (3rd Cir. 1995)..... 7

McNulty v. Sandoval County,
No. CIV 05-221 BB/ACT, United States District Court,
D. New Mexico, August 15, 2005..... 8

Piatt v. MacDougall,
773 F.2d 1032, 1036 (9th Cir. 1985)..... 6

Price v. City of Ormond Beach,
Case No. 6:05-cv-1064-Orl-31KRS, United States
District Court, M.D. Florida, Orlando Division,
May 19, 2006..... 6, 7

Table Of Cited Authorities

	Page
Sierra Lake Reserve v. City of Rocklin, 938 F.2d 951, at 956 (9th Cir. 1991).....	6
Terlecky v. Downs, No. CIV 04-1121 BB/DJS, United States District Court, D. New Mexico, January 24, 2006 and– March 27, 2006.....	7, 8
Zinermon v. Burch, 494 U.S. 113 (1990).....	5
Constitutions	
U.S. Constitution, 14th Amendment.....	1, 5, 6
Statutes	
29 U.S.C. § 201 *et seq.* (FLSA).....	4
42 U.S.C. § 1983.....	1, 4
Idaho Code, § 31-714.....	10
Rules	
U.S. Supreme Court Rule 44.....	1
U.S. Supreme Court Rule 44(2).....	1

PETITION FOR REHEARING

Introduction

Pursuant to Rule 44, U.S. Supreme Court Rules, Petitioner does request this Court reconsider its Order of October 30, 2006, denying the Petition For Writ Of Certiorari. This Petition For Rehearing is submitted upon Rule 44(2), as Petitioner does believe intervening circumstances exist which may have a substantial effect upon this matter, and Petitioner's concern is she may not obtain the relief required in any other form as being sought through this Court.

INTERVENING CIRCUMSTANCES

On July 5, 2005, while awaiting decision from the direct appeal to the Idaho Supreme Court from those consolidated proceedings in *Gibson v. Ada County, et al.*, 142 Idaho 746, 133 P.3d 1211 (2006), Petitioner filed an action under the two-year statute of limitations to preserve her claim against Ada County. That proceedings was filed in the United States District Court, District of Idaho (*Gibson v. Ada County, et al.*, CV05-263-S-EJL), pertaining to the July 2, 2003 denial of a due process procedural hearing. That suit was brought under the Civil Rights Act, 42 U.S.C. § 1983, and came into being from Ada County's intentional denial of Petitioner's constitutionally vested right under the 14th Amendment of the U.S. Constitution to engage adequate state procedural due process, a denial of equal protection, and denial of a right to access state courts to secure judicial review of property rights, which was being denied under color and pretense of state law, in **deliberate violation** of federal law.

On March 1, 2006, Petitioner amended that federal action, to include the state's failure to provide adequate procedural due process, as determined from the February 9, 2006 Idaho Supreme Court decision in *Gibson v. Ada County, et al., supra.*

Prior to filing that Title 42 claim in U.S. District Court, Petitioner had incessantly challenged the policies, procedures and actions of Ada County, its Sheriff's and its Board of

Commissioners, but with no success at the state court level. Those Respondents not only denied Petitioner a constitutionally guaranteed right to adequate due process administrative review procedures, but deliberately denied Petitioner any lawful means to raise the facts, merits and issues with an agency to allow access for judicial review with a court to challenge the wrongful conduct.

On March 1, 2006, the U.S. District Court entered a Memorandum Decision and Order (*Appendix* 589a-604a), dismissing the action based upon issue-claim and *res judicata-collateral estoppel* defenses, and stated:

> "Because the claims and issues presented here were previously raised, argued, and finally decided on the merits in the prior state court actions between these same parties and/or those in privity, they are precluded and the motion to dismiss shall be granted". *Appendix* 599a.

The federal court surmised the manner in which Petitioner stated the historical events in the state court cases, was "a basis upon which Gibson seeks recovery" in this matter. *Appendix* 601a.

The federal court appears to have accepted the argument presented by Ada County, which stated:

> "Gibson is merely reiterating issues that she unsuccessfully presented at the state court level. Since she has been dissatisfied with her previous results, she now wants this Court to step in and override the state court proceedings".

The Idaho courts have denied Petitioner her rights under the Due Process Clause and Equal Protection Clause, and it was believed the federal court, as a matter of law, is compelled to step in and override proceedings when a state court fails to provide constitutionally adequate procedural due process remedies. The U.S. District Court in Idaho, however, has failed to do so.

With its March 1, 2006 Memorandum Decision and Order, the U.S. District Court advanced a supposition Petitioner should

not be allowed to seek redress in federal court from procedural due process violations that occurred by state action, believed to be contrary to federal law.

From that March 1, 2006 Order, it is Petitioner's belief courts situated in Idaho may not possess a similar appreciation of the meaning of the Due Process Clause of the U.S. Constitution, as do federal courts in other circuits. When the Idaho courts fail to provide adequate procedural due process remedies, the analysis of the Federal District Court should have been to have found state courts denied Petitioner any adequate state procedural due process, and federal courts had the authority and duty to correct that infringement of the U.S. Constitution, under existing established federal case authority.

Petitioner has thus far found no success (by either state or the local federal court) in any effort to secure any remedy to satisfy and protect her rights under the Due Process Clause and the Equal Protection Clause of the U.S. Constitution. She believes the lack of relief from both state and local federal court does particularly exemplify how governmental agencies in Idaho may have a judiciary to be over protective of public agencies.

These wrongful acts against Petitioner now include the following:

> **(1)** Denial of procedural due process when unilaterally placed on administrative leave, without pay, by the County Sheriff's Office, with no notice or hearing, which is deemed by federal law to be *de facto* termination when not providing procedural due process. *See Gilbert v. Homar*, 520 U.S. 924, at 930 (1997); *Homar v. Gilbert*, 89 F.3d 1009, 1015 (3rd Cir. 1996);
>
> **(2)** Denial of procedural due process by avoiding a pre-termination hearing, a prerequisite under federal law. *See Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487 (1985);

(3) Denial of procedural due process by denying the opportunity to engage an **unbiased** post-termination hearing with an **unbiased** tribunal, instead of a County agent;

(4) Denial of any procedural due process by denying an administrative agency review to challenge the non-established basis to terminate Petitioner's employment;

(5) Denial of procedural due process by failing to provide any forum to access judicial review of the termination, either by Petition For Judicial Review to a lower court, appellate review to the Idaho Supreme Court, Petition For Declaratory Judgment, Petition For Writ Of Mandamus, or Petition For Writ Of Certiorari to the Idaho Supreme Court;

(6) Denial of procedural due process by failing to provide adequate judicial review forum with an Idaho court under the *Fair Labor Standards Act* (FLSA), 29 U.S.C. § 201 *et seq.*, to enforce the "right of action" to recover overtime and regular wages due Petitioner, and seek redress for the retaliatory conduct when depriving Petitioner of her federal statutory "right of action" under FLSA; and,

(7) Denial of procedural due process by failing to provide an adequate judicial review forum with an Idaho court under the *Civil Rights Act*, 42 U.S.C. § 1983, causing need to address this uncertainty by federal assistance;

ARGUMENT

In *Gibson v. Ada County, et al.*, 142 Idaho 746, 133 P.3d 1211 (2006), the Idaho Supreme Court agreed that pursuant to the Ada County Merit System, Petitioner was classified and tenured, could be terminated only for cause, and such a termination **must** be subject to adequate state procedural due process review, as a matter of federal law. Petitioner has been denied any adequate state (and now federal) procedural due process remedy to review the official action undertaken by

Respondents, and has been denied review of the violations of her due process rights and equal protection rights under the 14th Amendment to the U.S. Constitution, when said rights are protected and actionable under 42 U.S.C. § 1983.

Procedural due process analysis was decided by the U.S. Supreme Court in *Zinermon v. Burch*, 494 U.S. 113, 125 (1990), when it affirmed the Due Process Clause encompasses a guarantee of **fair procedure**, and stated when, in procedural due process claims, state action, without providing due process of law, serves to deprive an individual of a constitutionally protected interest in "life, liberty, or **property**", such state deprivation of a tenured property right is unconstitutional. Procedural due process rules are meant to protect persons, not from the deprivation, but from the mistaken or **unjustified** deprivation of life, liberty, or property. *See Carey v. Piphus*, 435 U.S. 247, 259 (1978).

A constitutional violation actionable under 42 U.S.C. § 1983 is not complete (actionable) **unless** and **until** the **state fails to provide due process**. In *Zinermon*, 494 U.S., at 125-126. Justice Blackmun stated:

> "The constitutional violation actionable under § 1983 is not complete when the deprivation occurs; it is not complete unless and until the State fails to provide due process. Therefore, to determine whether a constitutional violation has occurred, it is necessary to ask **what process the State provided, and whether it was constitutionally adequate**. This inquiry would examine the procedural safeguards built into the **statutory** or **administrative procedure** of **effecting** the **deprivation**, and any remedies for erroneous deprivations provided by statute or tort law."

Federal courts rely on *Zinermon*, 494 U.S., to determine procedural due process violations and when the **accrual** of the action begins. In **all** of these **cases**, the federal courts **affirmed** a procedural **due process violation does not occur** and is therefore **not actionable unless** and **until** the **State**

fails to provide due process. *See Bayer v. Town of Peshtigo*, Case No. 05-C-661, at 7, United States District Court, E.D. Wisconsin, September 11, 2006; *Koltonuk v. Borough of Laureldale*, Civil Action No. 05-0106, at 14-15, United States District Court, E.D. Pennsylvania, July 18, 2006; *Day v. Borough of Carlisle*, Civil Action No. 1:CV-04-1040, at fn7, United States District Court, M.D. Pennsylvania, July 10, 2006; *Price v. City of Ormond Beach*, Case No. 6:05-cv-1064-Orl-31KRS, at 8-10, United States District Court, M.D. Florida, Orlando Division, May 19, 2006; *Belas v. Juniata County School Dist.*, Civil Action No. 1:CV-04-505, at 14, United States District Court, M.D. Pennsylvania, August 26, 2005; *Kildare v. Saenz*, 325 F.3d 1078, at 1085-1086 (9th Cir. 2003); *Jackson v. City of Stone Mountain*, 232 F.Supp.2d 1337, at 1368 (N.D. Ga. 2002); *Cotton v. Jackson*, 216 F.3d 1328, at 1331 (11th Cir. 2000); *Horton v. Bd., Cnty. Com'rs, Flagler Cnty.*, 202 F.3d 1297, at 1300 (11th Cir. 2000); *McDaniels v. Flick*, 59 F.3d 446, at 459 (3rd Cir. 1995); *Sierra Lake Reserve v. City of Rocklin*, 938 F.2d 951, at 956 (9th Cir. 1991).

Petitioner has been denied any adequate state procedure to remedy the due process and equal protection violations under the Due Process and Equal Protection Clause of the 14th Amendment to the U.S. Constitution. That fact came to light when the Idaho Supreme Court issued its decision February 9, 2006, and then closed the door when denying rehearing by its order of May 9, 2006.

The Merit System under which Petitioner was employed is a County policy created under the authorization of the Idaho Constitution and Idaho law, vesting County employees with property rights in their employment, and provides prescribed conduct for County officials whenever they choose to terminate an employee vested with permanent classified employment status. *See also Piatt v. MacDougall*, 773 F.2d 1032, 1036 (9th Cir. 1985).

The procedural **due process violation** of Petitioner's constitutional rights **did not** begin to **accrue** at the time of termination on December 27, 1999, or from the February 15, 2000 decision of the County's officer. Unfortunately, that has been suggested by the Idaho district court, the Idaho appellate court, and because of that, declared the *res judicata-collateral estoppel* defense that has now been applied in the U.S. District Court. Rather, as a matter of federal law, Petitioner's cause of action could only accrue once Petitioner has been absolutely denied state procedures, and no adequate procedure has been prescribed by Ada County, by the Idaho lower courts, by the Idaho Supreme Court, or by the U.S. District Court, which is now on appeal to the 9th Circuit Court of Appeals (Docket No. 06-35600). Only once it has been confirmed there exists **no** adequate **state** procedural due process available, does the action come into being. It appears clear that on May 9, 2006, the Idaho Supreme Court denied Petitioner any procedural state due process when it denied the Petition For Rehearing, and that established an accrual for Respondents' ongoing denial of due process rights. *See Day v. Borough of Carlisle*, supra, at fn 7); *Price v. City of Ormond Beach*, supra, at 9-10; *McDaniels v. Flick*, 59 F.3d, at 461 (3rd Cir. 1995).

Constitutional violations of Petitioner's rights actionable under § 1983 during either pre-termination or post-termination periods are not deemed complete until the state has failed to provide adequate procedural due process, and therefore, Petitioner's cause of action for due process violations could not accrue at the time she was placed on administrative leave, or on the date of the written order of termination on December 27, 1999 or on February 15, 2000.

Other U.S. District Courts, such as in the matter of *Terlecky v. City of Ruidoso Downs*, Case No. CIV 04-1121 BB/DJS, United States District Court, D. New Mexico, January 24, 2006 and March 27, 2006, show judicial concern and respect when protecting employees against violations of

rights under the Due Process Clause and the Equal Protection Clause, actionable under 42 U.S.C. § 1983. Those federal courts have confirmed those violations are **not complete** (actionable) **unless** and **until** the **state fails to provide due process**. *See also Hicks v. Jackson County Commission*, Civil Action No. CV-03-S-2858-NE, United States District Court, N.D. Alabama, Northeastern Division, June 23, 2005; *McKinney v. Pate*, 20 F.3d 1550 (11th Cir. 1994).

Of great interest, in *Terlecky*, the city had an established employee merit system with a provision that allowed appeal to state district court from termination decisions of the city council, though no authorization existed for such an appeal in their state statute. *Id.* 4. Analogous to the outcome of the matter decided by the federal court in *Terlecky*.

Though Petitioner was never provided a "pre"-termination hearing required by *Loudermill*, of curious note, the Idaho Supreme Court held "Gibson was given a pre-termination hearing by way of the hearing conducted on February 15, 2000". Not only was there a series of *de facto* terminations in July and August 1999, created substantially prior to the written decision of termination on December 27, 1999, Gibson was never provided any "pre-termination" procedure hearing prior to the *de facto* termination(s) or her "formal written termination" of December 27, 1999, and any suggestion the February 15, 2000 "hearing" (that actually occurred on January 25th & 26th, 2000), took place **after** the written termination, and any "pre"-termination contention, is a fallacious perception of the facts. The U.S. Supreme Court in *Loudermill* held that although an employee had a "constitutionally adequate" post-termination hearing, it did not remedy a **constitutionally inadequate** pre-termination hearing. Post-termination hearings, no matter how elaborate, do not relieve the employer of providing pre-termination procedural protections noted in *Loudermill*. *See McNulty v. Sandoval County*, No. CIV 05-221 BB/ACT, United States District Court, D. New Mexico, August 15, 2005.

Furthermore, the February 15, 2000 decision was not rendered by an unbiased tribunal. It was the County's seal of approval from their own employed official, who chose to create an additional basis to terminate, demonstrating his zeal for County loyalty, failing to provide Petitioner notice or constitutional due process. Of interest, the Idaho Supreme Court declared the Merit System procedural process infirm, and notably, no procedural due process was thereafter forthcoming from the authorized agency, nor adopted or approved by the County.

Petitioner has been seeking a court imposed injunction requiring reinstatement of her classified employment with full rank, seniority, benefits, privileges, entitlements, and back pay, retroactive to the first *de facto* termination, if not the later written decision of termination December 27, 1999. Petitioner is entitled to all overtime wages owed from October 16, 1998 to July 20, 1999, wages owed from August 25, 1999 to December 27, 1999 (the wrongful leave status), and compensation for costs and fees incurred in the preservation of Petitioner's rights.

In *Hansen v. White*, 947 F.2d 1378 (9th Cir. 1991), sheriff office employees initiated an appeal after the U.S. District Court (Idaho) incorrectly stated the law and created harm and prejudice to those employees. In *Hansen v. White*, 114 Idaho 907, 762 P.2d 820 (1988), the 9th Circuit put forth the following certified question to the Idaho Supreme Court:

> "Under Idaho law, have the county commissioners authority to institute a merit system binding county officers, particularly the sheriff, under which such officers may not terminate deputies and other employees in their department except for cause"?

The Idaho Supreme Court in *Hansen v. White*, 114 Idaho 907, 762 P.2d 820 (1988), answered the 9th Circuits' certified question, addressing that after county commissioners had enacted a merit system that protects permanent employees, an elected sheriff may **terminate** a deputy vested with property

rights for **good cause only**, subject to adequate state procedural due process remedies, equal protection, and judicial review, all of which Petitioner has been denied.

Hansen (114 Idaho 907) stated (at page 911):

> "The board of county commissioners has the statutory authority to create a reasonable county merit system, and such an act is a **valid legislative exercise** of its **express power** to promote the general welfare of the county".
>
> "Thus, once a deputy attains "permanent" status under the merit system, the deputy is no longer an employee "at will." Consequently, the **sheriff's implied power** to terminate employees **without cause**, which arises from the common law, not the constitution, **is** superceded **by the merit system**." (at page 913). (Emphasis added).

Under such merit system created by Ada County pursuant to *Idaho Code*, § 31-714, Petitioner could be terminated only for **"good cause"**, and that termination **must** have a right to **adequate** procedural **due process**, **equal protection** and **judicial review** of that deprivation of a property right.

CONCLUSION

Petitioner has been denied relief in state court and now in federal court (though on appeal to the 9th Circuit), and due to these intervening concerns of ongoing denial and uncertainty of an appeal, Petitioner does request this Court grant Petition For Writ Of Certiorari, to avoid the potential of conflicting circuit opinions, and take the matter now, rather than await the uncertainty of the appeal process at the 9th Circuit.

Respectfully submitted,

Vernon K. Smith
1900 West Main Street
Boise, Idaho 83702
(208) 345-1125

Attorney For Petitioner